FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE; CRIMINAL COURTS BAR ASSOCIATION; JAMES MCNALLY; JAMES JOHNSON BEY,
Plaintiffs-Appellees,

v.

JAMES T. BUTTS, City of Santa Monica Chief of Police; THE CITY OF SANTA MONICA; RAY H. COOPER; SHANE TALBOT,
Defendants-Appellants,

and

WILLIE L. WILLIAMS, Chief of Police; CITY OF LOS ANGELES; RAYMOND BENNETT; MICHAEL CROSBY,
Defendants.

No. 97-56499

D.C. No. CV-95-08634-ER

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE,
Plaintiff,

and

JAMES MCNALLY; JAMES JOHNSON BEY,
Plaintiffs-Appellees,

v.

No. 97-56510

D.C. No. CV-95-08634-ER

ORDER AND AMENDED OPINION

JAMES T. BUTTS, City of Santa Monica Chief of Police; THE CITY OF SANTA MONICA; RAY H. COOPER; SHANE TALBOT; CITY OF LOS ANGELES,

Defendants-Appellees,

v.

RAYMOND BENNETT; MICHAEL CROSBY,

Defendants-Appellants.

Appeals from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
December 7, 1998—Pasadena, California

Filed November 8, 1999
Amended January 3, 2000

Before: William C. Canby, Jr. and Sidney R. Thomas, Circuit Judges, and William W Schwarzer,[1] District Judge.

Opinion by Judge Canby; Partial Dissent and Concurrence by Judge Schwarzer

[1]The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

COUNSEL

Marsha Jones Moutrie, City Attorney, Barbara Greenstein, Deputy City Attorney, Santa Monica, California; Debra L. Gonzales, Deputy City Attorney, Los Angeles, California, for the defendants-appellants.

Charles D. Weisselberg, Supervising Attorney, Victoria Wong, Law Student, Post-Conviction Justice Project, University of Southern California Law School, Los Angeles, California, for the plaintiffs-appellees.

Joel E. Carey, Deputy Attorney General, Sacramento, California, for amicus State of California; Charles L. Hobson, Criminal Justice Legal Foundation, Sacramento, California, for amicus Criminal Justice Legal Foundation; Devallis Rutledge, Office of the District Attorney, Santa Ana, California, for amicus California Coalition of Law Enforcement Associations; William J. Hadden, Silver, Hadden & Silver, Santa Monica, California, for amici Peace Officers' Legal Research Association, Peace Officers' Legal Research Association Legal Defense Fund, Santa Monica Police Officers' Association, Los Angeles Police Protective League; Dilan A. Esper, West Hollywood, California, National Legal Aid and Defender Association; Mark A. Borenstein, Tuttle & Taylor, Los Angeles, California, for amicus National Association of Criminal Defense Lawyers.

ORDER

In the slip opinion filed in this case on November 8, 1999:

At page 13391, the second full sentence of the section entitled "*James McNally Interrogation*" is amended to read as follows:

> The interview took place in a jail in Arizona and lasted for over an hour.

At page 13397, the second full sentence of the first full paragraph is amended to read as follows:

> Los Angeles police interrogated him after he had been handcuffed to a bench at the police station for four hours.

With these amendments, the majority of the panel, as constituted above, has voted to deny the petition for panel rehearing. Judge Thomas has voted to deny the petition for rehearing en banc, and Judge Canby has so recommended. Judge Schwarzer has voted to grant the petition for panel rehearing and recommends granting the petition for rehearing en banc.

The petition for en banc rehearing has been circulated to the full court, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are denied.

OPINION

CANBY, Circuit Judge:

James McNally and James Bey, California state prisoners, joined in bringing this civil rights action against the cities of Los Angeles and Santa Monica, California, individual police officers and their respective Chiefs of Police. *See* 42 U.S.C. § 1983. McNally and Bey complain that they were the victims of a policy of the defendant police to defy the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). The alleged pol-

icy, set forth in certain training programs and materials, was to continue to interrogate suspects "outside *Miranda*" despite the suspects' invocation of their right to remain silent and their requests for an attorney.

The district court denied the motions of individual defendants James Butts, Jr., Shane Talbot, Ray Cooper, Raymond Bennett and Michael Crosby, for summary judgment on the ground of qualified immunity.[2] Those officers have now brought this interlocutory appeal challenging the denial of immunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). We affirm the order of the district court denying qualified immunity.[3]

BACKGROUND

Miranda requires that, once "the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 473-74. "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* at 474. These commands are clear on their face. Statements of an accused taken in violation of *Miranda*, however, have been held admissible for purposes of impeachment of a defendant who takes the stand and testifies inconsistently with his prior statement. *See Oregon v. Hass*, 420 U.S. 714 (1975); *Harris v. New York*, 401 U.S. 222 (1971). The policy of questioning "outside *Miranda*" appears to be based on the proposition, which we reject, that *Harris* and *Hass*

[2]We reject the plaintiffs' contention that defendant James Butts, the Santa Monica Chief of Police, did not seek qualified immunity in the district court and is thus not entitled to this appeal. The record indicates that Butts did request qualified immunity.

[3]The order of the district court denying summary judgment is unpublished. The district court earlier entered an order denying a motion to dismiss on the ground of qualified immunity. That order is published. *See California Attorneys for Criminal Justice v. Butts*, 922 F. Supp. 327 (C.D. Cal. 1996).

negate the quoted imperatives of *Miranda*.[4] How the policy of questioning "outside *Miranda*" worked in practice in these two cases is best demonstrated by the transcripts of the taped interview sessions with McNally and Bey.

James McNally Interrogation

Santa Monica detectives interrogated McNally about his role in a brutal murder. The interview took place in a jail in Arizona and lasted for over an hour. McNally was advised of his *Miranda* rights and freely answered questions for a considerable period of time. He did not deny having stabbed the victim, but claimed that he had acted in self-defense. Eventually, the discussion focused on the degree of crime that might be charged, and whether McNally would waive extradition. At this point, the questioning took the following turn:

> McNally: How 'bout we do this? How 'bout I'll waive extradition. I'll go with "you's." Let me talk to a California lawyer and we'll get back together.
>
> D1:[5] You'll what?
>
> McNally: Okay. I'm saying, "I'll waive extradition. I'll go with "you's"— no hassle, no problem . . . .
>
> D: Okay. Under, understand . . . .
>
> McNally: So . . .

[4]The defendants do not urge that their questioning of McNally and Bey after they requested an attorney was justified by exigent circumstances. There was, for example, no ticking bomb that had to be located. *Cf. New York v. Quarles*, 467 U.S. 649 (1984) (recognizing public safety exception to *Miranda*).

[5]In the transcript, "D" is Detective Talbot; "D1" is Detective Cooper. McNally is abbreviated "M" in the transcript but is spelled out here to aid understanding.

D: . . . understand what happens when you get to California — when you get your attorney. No attorney in his right mind is gonna' tell you talk with the police.

McNally: Oh, I know . . .

D: Justice works the same way as it does on the East Coast.

McNally: No, I, I understand. I, I just wanna' clarify a couple things in my mind. I, I know that. I know a lawyer's not gonna' tell me to talk to "you's."

D: Right.

McNally: I know that. Let me just talk to him about a couple — you know, I know Pennsylvania Law just 'cuz I've been through it. I don't know California Law. I don't . . . let me talk to him a little bit and we'll get back — I promise I'll get back together with "you's."

D: So, you don't wanna' . . . .

D1: You're not gonna tell us . . .

D: . . . you don't wanna' tell us what happened . . .

McNally: No . . .

D: . . . now?

McNally: . . . not at this time. It's, it's too scary for me right now. I'd, I'd rather talk to a lawyer.

D: Alright.

McNally: I'm not trying to impede your investigation.

D: No, I understand.

McNally: I'll with "you's" . . . [sic]

D: I understand.

McNally: . . . no hassle . . . .

D: Okay, now, let me, let me explain to you what's happened. You've basically invoked your Right to have an attorney . . .

McNally: Right.

D: . . . okay? At this point, nothing that you say can be used against you in Court . . . in California because you have invoked your Right to have an attorney.

McNally: Right.

D: I still would like to know what happened now because — well, I'll tell you where I come from. I don't trust anything that anybody tells me after they've talked to an attorney and the D.A. that will be working with us on this case doesn't either.

So, basically, what they'll do is they'll play a game of "what's this case worth?" And they'll do "make, let's make a deal type thing."

McNally: I know.

D: What I wanna' know from you now is what you might tell me later so I know what you tell me later

is the same as what you're gonna' tell me now because what you tell me later is gonna' be on the record.

D1: This is all on tape. This — what we're tellin' you. You've invoked your Rights. Everything from this point on . . .

D: Cannot . . .

D1: . . . regarding this case cannot be used against you. We're, we're making you the guarantee. It won't . . . you know, even though its on tape . . . .

McNally: Shut that thing off then.

D: Well, this is the record of what you're telling us. You, we . . .

D1: Yeah. It's also the record of you invoking your Rights. You want an attorney . . . . which is fine . . .

D: And it's — let me explain to you something else. Basically, what this does is validate for you and for the District Attorney that what you tell me now is what you're gonna' tell — hopefully, tell us later. 'Cuz the evidence will bear out, I think, what I, I already know.

So, once we start a tape, we don't turn it off. If you wanna' turn off the tape then we stop the conversation and, and we'll go ahead . . . .

D1: See . . .

D: . . . and do the process. I just wanted to explain to you and I'm not trying to be "hard ass" about this. It's just the way I work. I know it's the way the Dis-

trict Attorney that I'm working with, uh, Richard Stone, works. We just — and if you were in our place, would you trust something that somebody told you after they talked to an attorney?

D1: It's like "black mail" with attorneys, Man. We know that.

D: I mean, I mean, first of all, if you could trust the attorney that you're working with he's gonna', and if you can work and if you tell him the truth, he gonna' work with you somehow to make a better deal, okay?

McNally: (no audible response).

D: They're, the deal is here. It's up to them . . .

D1: It's . . .

D: . . . it's up to them to talk about it. The only thing is, everything that falls after this — we'll go in one direction based on the physical evidence and the statements that we have. If we don't have anything to the contrary, that's the direction we're gonna' go and we're gonna' push it.

McNally: Right.

D: Okay, and fuck your attorney. It's just — I don't care about him anymore.

McNally: Yeah.

D: Okay. As far as I'm concerned, you know, they really mess up the system. I wanna' know now what you're going to tell me later. It can't be used against you. We . . .

D1: This is your opportunity.

D: . . . told you that.

D1: And it's — this is your opportunity and it's not gonna' be used against you. If you . . .

D: If you want, you can write it out and start it with "The Detective told me this statement cannot be used against me . . ." I'll sign it and I'll make a xerox copy of it and you can have a xerox. It's up to you. I'm not tryin' to trick you here.

(pause)

McNally: Alright. I'll . . . and this can't be used against me.

D1: No, absolutely. It's right on there. It's not — we're promising you, it's not gonna' be used against you — in the case in chief — against you, okay? Just, this is for our edification of what happened.

McNally then proceeded to tell the detectives a very different, and far more incriminating story.

At his trial, McNally moved to suppress his incriminating statement, and the trial court granted the motion, prohibiting the use of the statement even for purposes of impeachment. After McNally was convicted, however, the prosecutor used the statement against McNally at sentencing to urge the court to consider as an aggravating factor McNally's assertions of self-defense in contradiction of his statement to the police.

James Bey Interrogation

Bey was also suspected of a brutal murder. Los Angeles police interrogated him after he had been handcuffed to a

bench at the police station for four hours. He was asked a few questions about the matter before he was given his *Miranda* warnings. Immediately thereafter, the following exchange occurred:

> Bey: Am I being charged with murder? If I'm being charged with murder, then I won't have another word to say until I have an attorney.
>
> D[6]: Is that — ah — your feelings? Do you — That's why I questioned you, do you wish to—
>
> Bey: *** if you read me those rights, you must be gonna charge me with something. So I'll wait and see what happens. I won't say another word until I have an attorney.
>
> D: Well, like you say yourself, James, you're a suspect.
>
> Bey: Well, if I'm being charged with something, I'd rather not have anything else to say until I have an attorney.
>
> D: Okay?
>
> Let me explain something to you, James. I'm going to continue to ask you questions. Now, you realize that you didn't waive your rights. That means we can't use 'em in court.
>
> U: I think James is familiar with out *** outside Miranda. Are you familiar with that, James?

[6]In the Transcript, "D" is Detective Bennett; "U" is an "unidentified detective," alleged elsewhere to be Detective Crosby. In the Transcript, Bey is denoted as "B" but his name is spelled out here for ease of understanding. Unintelligible passages in the tape of interview are denoted in the Transcript by asterisks: "***."

Bey: I don't — I don't know too much about the law. I'm just telling you I know to keep my mouth shut *** somebody to put me in jail.

D: Well, James, I'll tell you what, there's a lot of physical evidence which doesn't lie, James.

Do you know why we were so long before we got here to talk to you?

Bey: No, I don't. I know that you all were in my apartment looking around. I don't know what you were looking for.

D: Not only looking around. We were in your apartment with our what they call Scientific Investigation Division people, or personnel. These are experts in getting physical evidence.

Bey: Uh-huh.

D: And we got some very incriminating physical evidence, my friend.

Bey: ***

D: Stuff that can't be explained away.

Bey: Well, we'll have to see what happens. But I'm not gonna say nothing *** an attorney ***.

D: Why don't you tell me what happened that night?

Thereafter, Bey admitted that the murder victim had been in his apartment on the night she was killed, and that she had previously "ripped him off" of small amounts of money. He also made various other statements about the evening in question, although he denied committing the murder. Bey stated in

his deposition that Detective Bennett appeared angry at times during the interview, spoke loudly, made threatening gestures, and adopted a "condemnatory" tone.

At trial, Bey testified and his statement was used to impeach him. He was convicted of first degree murder. On appeal, the state court of appeal, after reviewing the uncontradicted evidence, stated: "We . . . are compelled to conclude that under these circumstances, appellant's statements were coerced and involuntary, and should not have been introduced to impeach his trial testimony." *People v. Bey*, 27 Cal. Rptr. 2d 28, 31 (1993). The court held the error to be harmless, however, and affirmed the conviction. *Id.* at 32.

DISCUSSION

There can be little question that the insistence of the above interrogators on questioning after invocation of the right to silence and unequivocal requests for counsel violated the strictures of *Miranda* and did so intentionally. The defendants contend, however, that they are nevertheless entitled to qualified immunity because reasonable officers in their position could have believed that their interrogation did not violate "clearly established rights" of McNally and Bey. *See Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987). Their contention is based on three propositions, all of which we reject: (1) that McNally and Bey have not alleged violation of a constitutional right; (2) that the right was not clearly established, in light of subsequent qualifications of *Miranda*; and (3) that the defendants could reasonably rely on training materials endorsing questioning "outside *Miranda*." We address these contentions in turn.

The Constitutional Right

[1] The first question is whether McNally and Bey have alleged the violation of a constitutional right at all. *See County of Sacramento v. Lewis*, 118 S. Ct. 1708, 1714 n.5

(1998). The defendants contend that *Miranda* is a prophylactic rule, not a constitutional right. In the narrowest sense, this contention is correct: there is no constitutional right to the *Miranda* warnings themselves. *New York v. Quarles*, 467 U.S. 649, 654 (1984). But *Miranda* rights are brigaded with the right against self-incrimination and supply " 'practical reinforcement' for the Fifth Amendment right." *Id.* (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)). Indeed, the connection between *Miranda* and the constitutional right against self-incrimination is demonstrated by the fact that *Miranda* reversed a state court judgment, even though the Supreme Court observed that it "might not find the defendants' statements to have been involuntary in traditional terms." *Miranda*, 384 U.S. at 457. The Supreme Court has continued to enforce *Miranda* in both direct and habeas corpus review of state court judgments. *See, e.g., Minnick v. Mississippi*, 498 U.S. 146 (1990) (direct review); *Withrow v. Williams*, 507 U.S. 680 (1993) (habeas corpus). The Supreme Court's review of state judgments is confined, of course, to constitutional issues; it has no power to enforce mere supervisory rules on the States. *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991). Thus *Miranda* cannot be viewed entirely apart from the constitutional rights that it protects.

The defendants argue, however, that all of these cases deal with the *admission* of statements taken in violation of *Miranda*; they do not deal with a right against questioning apart from use of the statements at trial.[7] It is very difficult, however, to read *Miranda* that way:

[7]There is a certain perversity in this argument. The exclusionary rule is strong and unpleasant medicine that can keep probative evidence from the jury. The primary reason for employing the rule, with all its disadvantages, is that it is normally the most effective way to achieve the overarching goal of controlling police behavior that threatens the constitutional rights of individuals. *See, e.g., Elkins v. United States*, 364 U.S. 206, 217-18 (1960). It makes no sense to hold that other means of controlling police behavior ought not to be permitted because the exclusionary rule, though ineffective for the purpose, is in place.

> Today, then, there can be no doubt that the Fifth Amendment privilege is available *outside of criminal court proceedings and serves to protect persons in all settings* in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and *the exercise of those rights must be fully honored.*

Miranda, 384 U.S. at 467 (emphases added). This language focuses on rights of individuals *at interrogation.*

In any event, we have squarely rejected the defendants' contention in *Cooper v. Dupnik*, 963 F.2d 1220, 1251 (9th Cir. 1992) (en banc). "It is wrong . . . to relegate [the warning of the right to remain silent] to the status of 'only a prophylactic device': It is a prophylactic device, but it expresses a substantive right." *Id.* at 1240. In *Cooper*, we rejected a claim of qualified immunity asserted on behalf of officers who had interrogated a suspect who was never tried. We held that the request for an attorney is an "invocation of the substantive right to remain silent." *Id.* We held that the decision to interrogate Cooper despite his requests for an attorney, and to persist until Cooper broke down (even though he never confessed), was coercive and violated Cooper's constitutional rights. "It is irrelevant that Cooper's coerced statements were never introduced against him at trial. The Task Force's

wrongdoing was complete at the moment it forced Cooper to speak." *Id.* at 1237.[8]

[2] The defendants seek to distinguish *Cooper* on the ground that the nature of the questioning there was far more intimidating and coercive than that directed at McNally and Bey. They rely on *Cooper*'s point that a bare violation of *Miranda* is not enough to sustain a claim under § 1983:

> This case does not establish a cause of action where police officers continue to talk to a suspect after he asserts his rights and where they do so in a *benign way, without coercion or tactics that compel him to speak.* What we do confront is a case laden with police misconduct that is "identical with the historical practices [of incommunicado interrogation] at which the right against self-incrimination was aimed."

Cooper, 963 F.2d at 1244 (emphasis added) (quoting *Tucker*, 417 U.S. at 444). But coercion has been claimed and the question whether it occurred remains to be tried; the district court held that McNally and Bey had raised a material issue of fact on that point, and denied summary judgment.[9] The district court's ruling is not surprising, in light of the fact that the state trial court suppressed McNally's statement even for impeachment purposes, and the state appellate court expressly concluded that Bey's statement was coerced. The district court was well aware of the distinction reflected in the above quotation from *Cooper*, but it also recognized that a failure to

[8]Thus McNally's and Bey's claims are not defeated by the fact that their statements may not have caused them harm at their trials; they seek redress for violations of their rights in the jail or stationhouse, not in the courthouse.

[9]McNally and Bey moved for summary judgment on their claim; the district court denied the motion. That denial of summary judgment, of course, is not subject to interlocutory appeal and is not before us. *See* 28 U.S.C. § 1291.

comply with *Miranda* can be viewed as an aggravation of other coercive tactics. *California Attys. for Criminal Justice v. Butts*, 922 F. Supp. 327, 336 & n.13 (C.D. Cal. 1996); *see Collazo v. Estelle*, 940 F.2d 411, 418 (9th Cir. 1991). Indeed, in recently holding a confession to have been coerced, we placed great emphasis on the fact that officers had ignored a request for counsel and had misrepresented that any statement thereafter made could not be used in court. *See Henry v. Kernan*, 177 F.3d 1152, 1158 (9th Cir. 1999). In any event, the nature and effect of the defendants' tactics in this case are yet to be resolved by the trier of fact. To the extent that the defendants' claim of immunity depends upon unresolved and genuine issues of fact, it is not appropriate for review on this interlocutory appeal. *See Johnson v. Jones*, 515 U.S. 304, 319-20 (1995); *Behrens v. Pelletier*, 516 U.S. 299, 312-13 (1996).

The Right is Clearly Established

[3] To be "clearly established" for the purpose of overcoming qualified immunity, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. *Miranda* could scarcely be more clear in stating that, once a suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, *the interrogation must cease*," and that if he "states that he wants an attorney, the interrogation *must cease until an attorney is present*." *Miranda*, 384 U.S. at 473-74 (emphases added). *See also Davis v. United States*, 512 U.S. 452, 458 (1994); *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991); *Minnick*, 498 U.S. at 152. The rule under these decisions is unmistakable. As we held in *Cooper*, "[t]here is no question that the Constitutional holding in *Miranda* is 'clearly established' law." *Cooper*, 963 F.2d at 1237.[10]

[10]Defendants also point out that *Cooper* was the first case that allowed recovery under § 1983 for interrogation "outside" Miranda. Accordingly,

[4] There is equally no question that reasonable officers in the defendants' position would know that their actions violated McNally's and Bey's *Miranda* rights. McNally and Bey both invoked their rights to speak to an attorney, in a manner indicating that they did not want the interrogation to proceed without such a consultation. The detectives deliberately ignored these requests. Yet, "[t]he *per se* aspect of *Miranda* was . . . based on the unique role the lawyer plays in the adversary system of criminal justice in this country." *Fare v. Michael C.*, 442 U.S. 707, 719 (1979). The detectives in McNally's case nevertheless attempted to discourage him from seeking counsel, implied that his situation would become much worse if he spoke with an attorney, and assured him that whatever he said could not be used against him in any way. After telling McNally several times that anything he said thereafter could not be used against him, one of the detectives inserted "in the case in chief," with no explanation of what that term meant. This unexplained qualification, which McNally has asserted he did not understand, cannot overcome the many untrue and unqualified statements that preceded it.[11]

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because *Cooper* was decided after these interrogations, the detectives argue that they were not on notice that their conduct was unconstitutional. This argument misunderstands both *Cooper* and the qualified immunity analysis. First, in *Cooper* we did not *establish* that this conduct is unconstitutional — we *recognized* it. We held that Cooper's rights were clearly established *at the time of his interrogation in 1986* — years before the interrogation of McNally and Bey. *Cooper*, 963 F.2d at 1237 ("Appellants knew [in 1986] that they were violating the Constitution.") Second, even without an analogous case, the Supreme Court "and our case law do not require that degree of specificity." *Hyland v. Wonder*, 117 F.3d 405, 412 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1166 (1998). It is not necessary that a case has previously declared the very conduct in question unlawful. We only require that the "unlawfulness must be apparent." *Id.*; *see also Anderson*, 483 U.S. at 640.

[11]We recognize that subterfuge may be used in interrogating suspects, but misstating the legal use that can be made of their statements is not a permissible form of subterfuge. *Miranda* requires that suspects be advised that their statements can be used against them, *see Miranda*, 384 U.S. at 469; it can hardly countenance false advice that the statement *cannot* be used against them.

In Bey's case, the interrogator told Bey that he was going to continue to ask him questions after he asserted his right to remain silent. He went on to advise Bey that because he didn't waive his rights, "[t]hat means we can't use [any subsequent statements] in court." *Bey*, 27 Cal. Rptr. 2d at 30. On appeal, the state court found this to be a "very troubling case, presenting a deliberate police violation of *Miranda* coupled with a misrepresentation to appellant about the legal consequences of that violation." *Id.* In so continuing interrogation and misinforming McNally and Bey concerning the legal effects of that interrogation, the defendants clearly violated the *Miranda* imperatives, thereby creating a danger of coercion as well as a presumption of it. *See Oregon v. Elstad*, 470 U.S. 298, 307 n.1 (*Miranda* violation creates legal presumption of coercion). Nearly identical conduct was one of the major factors leading us to find a confession involuntary in *Henry*, 177 F.3d at 1157.

The defendants contend they could not have known that their conduct violated clearly established rights because of the Supreme Court's rulings that statements taken in violation of the *Miranda* safeguards may be used for purposes of impeachment. *See e.g.*, *Oregon v. Hass*, 420 U.S. 714, 723-24 (1975); *Harris v. New York*, 401 U.S. 222, 226 (1971). They also rely on *Tucker*, in which the Court permitted the testimony of a witness who had been identified by the defendant in an interview preceded by incomplete advice of his rights. *See Tucker*, 417 U.S. at 438; *but see Mincey v. Arizona*, 437 U.S. 385, 398 (1978) ("involuntary" statements not allowed for any purpose). Thus, the defendants argue that they could reasonably believe that it was lawful to continue to press their interrogation, with misleading assurances that any further statements made by McNally or Bey could not be used against them.

Harris and *Tucker* are easily distinguished from the present case; both involved interrogations that preceded the decision in *Miranda*. In *Tucker*, the Supreme Court relied on that

point, as well as on the fact that the police had acted "in complete good faith." *Tucker*, 417 U.S. at 447. The interrogation in *Hass* did succeed *Miranda*, however; the defendant was being driven to the police station, was given *Miranda* warnings, and said he wanted to call a lawyer. He was told he could do so when they arrived, but there was further conversation about the crime during the rest of the trip. *Hass*, 420 U.S. at 715-17. The defendant's statements were held to be admissible for impeachment. *Id.* at 723-24. *Hass* did not appear, however, to involve a conscious decision to continue interrogation in the hope of obtaining impeachment evidence. That officers might so behave was described as a "speculative possibility," but in any event the Court determined to follow *Harris* and permit use of the statement for impeachment. *Id.* at 723.

[5] The Supreme Court has never suggested, however, that these decisions dealing with the peripheral use of statements obtained in violation of *Miranda* somehow overcame *Miranda*'s imperatives concerning proper police procedure. Indeed, the Court has on several occasions, after *Harris*, *Tucker*, and *Hass*, restated those imperatives. In *Fare v. Michael C.*, for example, the Court said:

> Whatever the defects, if any, of this relatively rigid requirement that interrogation cease upon the accused's request for an attorney, *Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible.

Fare, 442 U.S. at 718. The Supreme Court later canvassed the *Miranda* progeny in *Edwards v. Arizona*, 451 U.S. 477 (1981), stating:

> We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with

> *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.

Id. at 485. Again, in *Arizona v. Roberson*, 486 U.S. 675 (1988), the Court observed that "[t]he *Edwards* rule thus serves the purpose of providing 'clear and unequivocal' guidelines to the law enforcement profession." *Id.* at 682. *See also Davis*, 512 U.S. at 458; *McNeil*, 501 U.S. at 177; *Minnick*, 498 U.S. at 151.

[6] These cases indicate that there has been no weakening in *Miranda*'s mandates to protect the *rights* of suspects *during* custodial interrogation. *See, e.g., Michigan v. Mosley*, 423 U.S. 96, 99 (1975) (*Miranda* promulgated "safeguards to protect the . . . constitutional rights of persons subjected to custodial police interrogation."). In the face of these clear and unequivocal directions, reasonable officers in the position of defendants would have understood that they were violating the rights of McNally and Bey in interrogating them in the manner that they did. "Any minimally trained police officer should have known such pressure was improper and likely to produce involuntary statements." *Henry*, 177 F.3d at 1158.

Reliance on Training and Training Materials

[7] The defendants next contend that their reliance on training and training materials entitles them to qualified immunity. The district court rejected this argument holding that "following orders" will only insulate officers from liability when "reliance is objectively reasonable." *Butts*, 922 F. Supp. at 338. The court concluded that a "reasonable person could not reconcile the alleged practice of ignoring the assertion of *Miranda* rights with the commands of *Miranda*, and hence, reliance on the alleged policy cannot be objectively reasonable." *Id.*; *see also Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994) ("[I]ndividuals cannot always

be held immune for the results of their official conduct simply because they were enforcing policies or orders . . . .").

[8] The fact that Los Angeles and Santa Monica may have trained their police to violate the rights of individuals does not provide any defense for these officers. Their policy contradicts the safeguards provided by *Miranda*, and, at the very least, is in direct conflict with *Cooper*. Contrary to the assertions by the defendants, *Cooper* did not sanction this technique:

> The primary aggravating circumstance *is the Task Force's purpose* of making it difficult, if not impossible, for a charged suspect to take the stand in his own defense — as Taylor said, "to help keep him off the stand." By forcing Cooper to talk in the police station, the officers hoped to prevent him from being able to do so in the courtroom. We note that their purpose was not just to be able to impeach him if he took the stand and lied, but to keep him off the stand altogether. *This tactic corrupts the doctrine* [the impeachment exception] established in *Harris*.

Cooper, 963 F.2d at 1249 (emphases added) (analyzing whether the police conduct "shocks the conscience"). Furthermore, training officers that inadmissible statements may nevertheless be used for impeachment purposes hardly sanctions this tactic of routinely and intentionally ignoring requests to speak to an attorney. For all of the reasons set forth in the preceding section of this opinion, a reasonable police officer should have known that this conduct was improper and violated the rights of McNally and Bey, whether or not the conduct was endorsed by training materials. Moreover, these officers had discretion over their interrogation methods. Their training did not require officers to interrogate "outside *Miranda*." They acted at their own election.

CONCLUSION

[9] The issue in this case is limited to whether these officers are entitled to qualified immunity as a matter of law. Accepting the facts as presented by McNally and Bey, as we must on summary judgment, *see Behrens*, 516 U.S. at 312-13, we conclude that the district court correctly ruled that the defendants were not entitled to qualified immunity. Officers who intentionally violate the rights protected by *Miranda* must expect to have to defend themselves in civil actions.

The order of the district court denying summary judgment on the ground of qualified immunity is

AFFIRMED.

SCHWARZER, Senior District Judge, Dissenting and Concurring:

I respectfully dissent as to plaintiff James Bey and concur in the judgment as to plaintiff James McNally. *Anderson v. Creighton*, 483 U.S. 635 (1987), tells us that the discretionary acts of government officials are protected by qualified immunity unless

> the right the official is alleged to have violated . . . [has] been 'clearly established.' The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [That] is to say that in the light of pre existing law the unlawfulness must be apparent.

Id. at 640. In determining the validity of the qualified immunity claim, therefore, we must look at the state of the law at the time the conduct complained of occurred. *See Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1451 (9th Cir. 1995)

(qualified immunity upheld because right of action under Title IX not clearly established until Supreme Court so decided, subsequent to the complained of conduct).

I. BEY

The majority rests its decision on the proposition that "[o]fficers who intentionally violate the rights protected by Miranda [[by] insistence . . . on questioning after invocation of the right to silence and unequivocal requests for counsel] must expect to have to defend themselves in civil actions." Op. at 76. Plaintiff James Bey was interrogated on March 8, 1991, by Officers Raymond Bennett and Michael Crosby. On February 6, 1991, one month earlier, a panel of this court decided *Cooper v. Dupnik*, 924 F.2d 1520 (9th Cir. 1991) (*Cooper I*), *rev'd en banc*, 963 F.2d 1220 (9th Cir. 1992) (*Cooper II*). Cooper had brought a § 1983 action against police officers and others alleging various violations of his constitutional rights in connection with his interrogation while in custody. The opinion states that "Cooper contends that his continued interrogation, following his clear and unequivocal request to contact his attorney is a patent violation of the constitution." *Id.* at 1526. It then goes on to firmly reject this contention, reversing the denial of qualified immunity, stating:

> Although there is no case on point from our circuit, all out-of-circuit cases hold that a plaintiff may not, as matter of law, maintain a section 1983 action based upon the failure by the police to issue Miranda warnings. [Citations omitted.] . . . These cases are not precisely on point, since in the instant case the police gave the Miranda warnings but refused to allow Cooper to exercise his rights. But the reasoning of these cases does apply—since Miranda requirements are not a constitutional prerequisite, their violation cannot form the basis of a section 1983 suit . . . . Cooper can cite to no case allowing

> a section 1983 suit under the circumstances of his case.

Id. at 1527-28.[1]

Moreover, the Supreme Court had repeatedly held prior to March 1991 that Miranda's warning requirement is not a dictate of the Fifth Amendment. Thus, in *Connecticut v. Barrett*, 479 U.S. 523 (1987), the Court said:

> It remains clear, however, that this prohibition on further questioning—like other aspects of Miranda—is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose. [Citation omitted.] By prohibiting further interrogation after the invocation of these rights, we erect an auxiliary barrier against police coercion.

Id. at 528. *See also Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (finding "these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected"); *New York v. Quarles*, 467 U.S. 649, 653 & n.3 (1984) (because Miranda is only a "prophylactic" rule, the Court considered a threat to public safety and acknowledged some "limited circumstances where the judicially imposed strictures of Miranda are inapplicable"); *Duckworth v. Eagan*, 492 U.S. 195, 201-03 (1989) (telling a suspect that an attorney will only be appointed if and when the suspect goes to trial does not render the notice constitutionally inadequate because the warnings mandated by Miranda are "procedural safeguards" and "prophylactic," not requiring administration in any exact

[1]The dissenting opinion did not take issue with this reasoning but read the allegations of the complaint as stating a claim for violation of rights secured by the Fifth, Sixth and Fourteenth Amendments. *Id.* at 1538.

form); *Michigan v. Harvey*, 494 U.S. 344, 350-51 (1990) (admitting a statement made without counsel and "not subject to proper Miranda" for impeachment purposes because the violations alleged "relate only to procedural safeguards"). Similarly, the Ninth Circuit prior to March 1991 did not recognize Miranda warnings as a cognizable constitutional right. "Miranda violations do not abridge the Fifth Amendment constitutional privilege against self-incrimination, but instead involve prophylactic standards laid down to safeguard that privilege." *United States v. Patterson*, 812 F.2d 1188, 1193 (9th Cir. 1987).

In declaring that "continued interrogation after a defendant invokes his Miranda right to counsel does not violate the Fifth Amendment," *Cooper*, 924 F.2d at 1528, and "that a violation of Miranda rights is not itself a violation of the constitution," *Id.* at 1527, the opinion in *Cooper I* was consistent with prior Supreme Court and Ninth Circuit law as it stood in 1991. Thus, the rationale of the majority opinion—that the officers violated a clearly established constitutional right by questioning Bey after he invoked his right to silence—cannot stand.[2] Bey argues, however, that this case is not about violation of the Miranda rules, but about coercion in violation of the Fifth Amendment. The question remains whether in 1991 there was clearly established law that the officers' interrogation violated the Fifth Amendment, i.e., when they continued the interrogation despite the suspect's repeated attempts to invoke his Miranda rights, asserted that they could not use his statements in court, and claimed that they possessed incriminating physical evidence. Op. at 66-67. It is not enough for the court simply to say that such interrogation tactics may be found to be

[2]It is true that in *Cooper II*, the court found that the officers knew in 1986 that they were violating the Constitution. 963 F.2d at 1237. Apart from the fact that the conduct involving Bey was substantially different from that involved in *Cooper*, the officers in *Cooper* did not have before them a court of appeals opinion rendered the preceding month that told them that violation of the Miranda rules was not a constitutional violation that could support a § 1983 claim.

coercive; for qualified immunity to be overcome, the law to that effect must be clearly established. The majority's reliance on the Miranda rules on this issue is a bootstrap argument for, as noted, those rules do not establish a constitutional right. The Court's statement in *Anderson v. Creighton*, 483 U.S. 635 is apposite: "[I]f the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*[*v. Fitzgerald*, 457 U.S. 800 (1982)]." *Id.* at 639. *Anderson* requires that "in the light of pre-existing law the unlawfulness must be apparent." *Id.* at 640. Because there was no such law in 1991, defendants' qualified immunity motion as to Bey's claims should have been granted.

II. McNALLY

Plaintiff James McNally was interrogated by Officers Ray Cooper and Shane Talbot on March 2, 1993. *Cooper II* had been decided on May 5, 1992, ten months earlier. In *Cooper II*, an *en banc* panel of this court reversed *Cooper I* and found interrogation "that was involuntary *because it was actively compelled and coerced* by law-enforcement officers during in-custody questioning" can form the basis for a § 1983 action against the police officers who interrogated him. *Cooper*, 963 F.2d at 1243. The limits of *Cooper II*'s holding, as relevant to this case, are encapsulated in the following statement: "This case does not establish a cause of action where police officers continue to talk to a suspect after he asserts his rights and where they do so in a benign way, without coercion or tactics that compel him to speak." *Id.* at 1244. It is plain, therefore, that *Cooper II* does not establish law that supports the majority opinion's broad rationale that "the insistence of the . . . interrogators on questioning after invocation of the right to silence and unequivocal requests for counsel violated the strictures of Miranda" and thereby barred qualified immunity. Op. at 66. Before a constitutional violation can be found, there must be more than a Miranda infraction—there must be

coercive tactics that compel the suspect to speak in violation of the Fifth Amendment. *Id.* at 1243-1244.

The question is what tactics, in 1993, were clearly established by law to be coercion violating the Fifth Amendment. The majority summarizes the conduct of the officers as "attempt[ing] to discourage [McNally] from seeking counsel, impl[ying] that his situation would become much worse if he spoke with an attorney, and assur[ing] him that whatever he said could not be used against him in any way." Op. at 71.[3] In July 1991, this court held substantially similar questioning of a suspect to be coercion violating the Fifth Amendment. *Collazo v. Estelle*, 940 F.2d 411 (9th Cir. 1991) (*en banc*). The critical colloquy between Detective Destro and defendant Collazo, after Collazo asked if he could speak with a lawyer, went as follows:

> Destro:—Once you get a lawyer, he's gonna say forget it. You know, don't talk to the police. Then it might be worse for you.

---

[3]Note that Bey's case is different, both on its facts and on its timing. The officers interrogating Bey in 1991 did not denigrate the role of counsel or threaten Bey with harsher treatment as a result of his invocation of his right to remain silent. In contrast, in McNally's interrogation, the detectives repeatedly indicated they would not trust McNally if he chose to consult a lawyer:

> Detective: —[Y]ou have invoked your right to have an attorney.
>
> McNally: —Right.
>
> Detective: —I still would like to know what happened now because—well, I'll tell you where I come from. I don't trust anything that anybody tells me after they've talked to an attorney and the D.A. that will be working with us on this case doesn't either.

The detectives went on to demean the role of counsel at least four more times, saying attorneys "really mess up the system," "fuck your attorney," "it's like black mail with attorneys, man," and "would you trust something that somebody told you after they talked to an attorney?" McNally proceeded to confess to the murder.

Collazo:—Pardon me?

Destro:—Then it might be worse for you.

Id. at 414.[4] The court held that "demean[ing] the pretrial role of counsel," *id.* at 418, in an "attempt to discourage Collazo from speaking to a lawyer," *id.* at 416, "l[eading] Collazo to believe he could reap some legal benefit by excluding defense attorneys from the pre-trial process," *id.* at 418, and "attempt[ing] in the police station to impose a penalty on Collazo's choice to remain silent amount[ed] to a serious infringement of Collazo's Fifth Amendment right." *Id.* at 417. The court concluded that "Officer Destro's overreaching behavior violated not only Miranda, but also the general Constitutional prohibition against coercive interrogation practices likely to result in involuntary responses." *Id.* at 419.

Because it was clearly established, prior to McNally's interrogation, that denigrating the role of counsel and threatening to impose a penalty on a suspect's exercise of his Fifth Amendment rights constitutes coercion violating the Fifth Amendment, Officers Cooper and Talbot are not entitled to qualified immunity. I therefore concur in the judgment affirming the denial of qualified immunity.

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[4]It was clearly established law in 1993 that a detective during interrogation cannot threaten a suspect with harsher treatment as a result of a suspect's decision to remain silent and not cooperate. *See United States v. Tingle*, 658 F.2d 1332, 1336, n.5 (9th Cir. 1981) ("[I]t is permissible for an interrogating officer to represent, under some circumstances, that the fact that the defendant cooperates will be communicated to the proper authorities, the same cannot be said of a representation that a defendant's failure to cooperate will be communicated to a prosecutor. Refusal to cooperate is every defendant's right under the fifth amendment."). *See also United States v. Guerrero*, 847 F.2d 1363, 1366 & n.2 (9th Cir. 1988) (noting that recommendations of leniency as a result of cooperation are appropriate, but "threatening to inform the prosecutor of a suspect's refusal to cooperate violates her fifth amendment right to remain silent.").

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE; CRIMINAL COURTS BAR ASSOCIATION; JAMES MCNALLY; JAMES JOHNSON BEY,
Plaintiffs-Appellees,

v.

JAMES T. BUTTS, City of Santa Monica Chief of Police; THE CITY OF SANTA MONICA; RAY H. COOPER; SHANE TALBOT,
Defendants-Appellants,

and

WILLIE L. WILLIAMS, Chief of Police; CITY OF LOS ANGELES; RAYMOND BENNETT; MICHAEL CROSBY,
Defendants.

No. 97-56499

D.C. No. CV-95-08634-ER

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE,
Plaintiff,

JAMES MCNALLY; JAMES JOHNSON BEY,
Plaintiffs-Appellees,

v.

No. 97-56510

D.C. No. CV-95-08634-ER

OPINION

JAMES T. BUTTS, City of Santa Monica Chief of Police; THE CITY OF SANTA MONICA; RAY H. COOPER; SHANE TALBOT; CITY OF LOS ANGELES,

Defendants-Appellees,

v.

RAYMOND BENNETT; MICHAEL CROSBY,

Defendants-Appellants.

Appeals from the United States District Court
for the Central District of California
Edward Rafeedie, District Judge, Presiding

Argued and Submitted
December 7, 1998—Pasadena, California

Filed November 8, 1999

Before: William C. Canby, Jr. and Sidney R. Thomas, Circuit Judges, and William W Schwarzer,[1] District Judge.

Opinion by Judge Canby; Partial Dissent and Concurrence by Judge Schwarzer

[1]The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

COUNSEL

Marsha Jones Moutrie, City Attorney, Barbara Greenstein, Deputy City Attorney, Santa Monica, California; Debra L. Gonzales, Deputy City Attorney, Los Angeles, California, for the defendants-appellants.

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Joel E. Carey, Deputy Attorney General, Sacramento, California, for amicus State of California; Charles L. Hobson, Criminal Justice Legal Foundation, Sacramento, California, for amicus Criminal Justice Legal Foundation; Devallis Rutledge, Office of the District Attorney, Santa Ana, California, for amicus California Coalition of Law Enforcement Associations; William J. Hadden, Silver, Hadden & Silver, Santa Monica, California, for amici Peace Officers' Legal Research Association, Peace Officers' Legal Research Association Legal Defense Fund, Santa Monica Police Officers' Association, Los Angeles Police Protective League; Dilan A. Esper, West Hollywood, California, National Legal Aid and Defender Association; Mark A. Borenstein, Tuttle & Taylor, Los Angeles, California, for amicus National Association of Criminal Defense Lawyers.

OPINION

CANBY, Circuit Judge:

James McNally and James Bey, California state prisoners, joined in bringing this civil rights action against the cities of Los Angeles and Santa Monica, California, individual police officers and their respective Chiefs of Police. *See* 42 U.S.C.

§ 1983. McNally and Bey complain that they were the victims of a policy of the defendant police to defy the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966). The alleged policy, set forth in certain training programs and materials, was to continue to interrogate suspects "outside *Miranda*" despite the suspects' invocation of their right to remain silent and their requests for an attorney.

The district court denied the motions of individual defendants James Butts, Jr., Shane Talbot, Ray Cooper, Raymond Bennett and Michael Crosby, for summary judgment on the ground of qualified immunity.[2] Those officers have now brought this interlocutory appeal challenging the denial of immunity. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985). We affirm the order of the district court denying qualified immunity.[3]

BACKGROUND

Miranda requires that, once "the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." *Miranda*, 384 U.S. at 473-74. "If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Id.* at 474. These commands are clear on their face. Statements of an accused taken in violation of *Miranda*, however, have been held admissible for purposes of impeachment of a defendant who takes the stand and testifies inconsistently with his prior statement. *See Oregon v. Hass*, 420 U.S.

[2]We reject the plaintiffs' contention that defendant James Butts, the Santa Monica Chief of Police, did not seek qualified immunity in the district court and is thus not entitled to this appeal. The record indicates that Butts did request qualified immunity.

[3]The order of the district court denying summary judgment is unpublished. The district court earlier entered an order denying a motion to dismiss on the ground of qualified immunity. That order is published. *See California Attorneys for Criminal Justice v. Butts*, 922 F. Supp. 327 (C.D. Cal. 1996).

BEST AVAILABLE

714 (1975); *Harris v. New York*, 401 U.S. 222 (1971). The policy of questioning "outside *Miranda*" appears to be based on the proposition, which we reject, that *Harris* and *Hass* negate the quoted imperatives of *Miranda*.[4] How the policy of questioning "outside *Miranda*" worked in practice in these two cases is best demonstrated by the transcripts of the taped interview sessions with McNally and Bey.

James McNally Interrogation

Santa Monica detectives interrogated McNally about his role in a brutal murder. The interview took place in a jail in Arizona and lasted for several hours. McNally was advised of his *Miranda* rights and freely answered questions for a considerable period of time. He did not deny having stabbed the victim, but claimed that he had acted in self-defense. Eventually, the discussion focused on the degree of crime that might be charged, and whether McNally would waive extradition. At this point, the questioning took the following turn:

> McNally: How 'bout we do this? How 'bout I'll waive extradition. I'll go with "you's." Let me talk to a California lawyer and we'll get back together.
>
> D1:[5] You'll what?
>
> McNally: Okay. I'm saying, "I'll waive extradition. I'll go with "you's"— no hassle, no problem . . . .

[4] The defendants do not urge that their questioning of McNally and Bey after they requested an attorney was justified by exigent circumstances. There was, for example, no ticking bomb that had to be located. *Cf. New York v. Quarles*, 467 U.S. 649 (1984) (recognizing public safety exception to *Miranda*).

[5] In the transcript, "D" is Detective Talbot; "D1" is Detective Cooper. McNally is abbreviated "M" in the transcript but is spelled out here to aid understanding.

LE COPY

D: Okay. Under, understand . . . .

McNally: So . . .

D: . . . understand what happens when you get to California — when you get your attorney. No attorney in his right mind is gonna' tell you talk with the police.

McNally: Oh, I know . . .

D: Justice works the same way as it does on the East Coast.

McNally: No, I, I understand. I, I just wanna' clarify a couple things in my mind. I, I know that. I know a lawyer's not gonna' tell me to talk to "you's."

D: Right.

McNally: I know that. Let me just talk to him about a couple — you know, I know Pennsylvania Law just 'cuz I've been through it. I don't know California Law. I don't . . . let me talk to him a little bit and we'll get back — I promise I'll get back together with "you's."

D: So, you don't wanna' . . . .

D1: You're not gonna tell us . . .

D: . . . you don't wanna' tell us what happened . . .

McNally: No . . .

D: . . . now?

McNally: . . . not at this time. It's, it's too scary for me right now. I'd, I'd rather talk to a lawyer.

D: Alright.

McNally: I'm not trying to impede your investigation.

D: No, I understand.

McNally: I'll with "you's" . . . [sic]

D: I understand.

McNally: . . . no hassle . . . .

D: Okay, now, let me, let me explain to you what's happened. You've basically invoked your Right to have an attorney . . .

McNally: Right.

D: . . . okay? At this point, nothing that you say can be used against you in Court . . . in California because you have invoked your Right to have an attorney.

McNally: Right.

D: I still would like to know what happened now because — well, I'll tell you where I come from. I don't trust anything that anybody tells me after they've talked to an attorney and the D.A. that will be working with us on this case doesn't either.

So, basically, what they'll do is they'll play a game of "what's this case worth?" And they'll do "make, let's make a deal type thing."

McNally: I know.

D: What I wanna' know from you now is what you might tell me later so I know what you tell me later is the same as what you're gonna' tell me now because what you tell me later is gonna' be on the record.

D1: This is all on tape. This — what we're tellin' you. You've invoked your Rights. Everything from this point on . . .

D: Cannot . . .

D1: . . . regarding this case cannot be used against you. We're, we're making you the guarantee. It won't . . . you know, even though its on tape . . . .

McNally: Shut that thing off then.

D: Well, this is the record of what you're telling us. You, we . . .

D1: Yeah. It's also the record of you invoking your Rights. You want an attorney . . . . which is fine . . .

D: And it's — let me explain to you something else. Basically, what this does is validate for you and for the District Attorney that what you tell me now is what you're gonna' tell — hopefully, tell us later. 'Cuz the evidence will bear out, I think, what I, I already know.

So, once we start a tape, we don't turn it off. If you wanna' turn off the tape then we stop the conversation and, and we'll go ahead . . . .

D1: See . . .

D: . . . and do the process. I just wanted to explain to you and I'm not trying to be "hard ass" about this.

It's just the way I work. I know it's the way the District Attorney that I'm working with, uh, Richard Stone, works. We just — and if you were in our place, would you trust something that somebody told you after they talked to an attorney?

D1: It's like "black mail" with attorneys, Man. We know that.

D: I mean, I mean, first of all, if you could trust the attorney that you're working with he's gonna', and if you can work and if you tell him the truth, he gonna' work with you somehow to make a better deal, okay?

McNally: (no audible response).

D: They're, the deal is here. It's up to them . . .

D1: It's . . .

D: . . . it's up to them to talk about it. The only thing is, everything that falls after this — we'll go in one direction based on the physical evidence and the statements that we have. If we don't have anything to the contrary, that's the direction we're gonna' go and we're gonna' push it.

McNally: Right.

D: Okay, and fuck your attorney. It's just — I don't care about him anymore.

McNally: Yeah.

D: Okay. As far as I'm concerned, you know, they really mess up the system. I wanna' know now what

you're going to tell me later. It can't be used against you. We . . .

D1: This is your opportunity.

D: . . . told you that.

D1: And it's — this is your opportunity and it's not gonna' be used against you. If you . . .

D: If you want, you can write it out and start it with "The Detective told me this statement cannot be used against me . . ." I'll sign it and I'll make a xerox copy of it and you can have a xerox. It's up to you. I'm not tryin' to trick you here.

(pause)

McNally: Alright. I'll . . . and this can't be used against me.

D1: No, absolutely. It's right on there. It's not — we're promising you, it's not gonna' be used against you — in the case in chief — against you, okay? Just, this is for our edification of what happened.

McNally then proceeded to tell the detectives a very different, and far more incriminating story.

At his trial, McNally moved to suppress his incriminating statement, and the trial court granted the motion, prohibiting the use of the statement even for purposes of impeachment. After McNally was convicted, however, the prosecutor used the statement against McNally at sentencing to urge the court to consider as an aggravating factor McNally's assertions of self-defense in contradiction of his statement to the police.

James Bey Interrogation

Bey was also suspected of a brutal murder. Los Angeles police interrogated him while he was handcuffed to a bench at the police station. He was asked a few questions about the matter before he was given his *Miranda* warnings. Immediately thereafter, the following exchange occurred:

> Bey: Am I being charged with murder? If I'm being charged with murder, then I won't have another word to say until I have an attorney.
>
> D[6]: Is that — ah — your feelings? Do you — That's why I questioned you, do you wish to—
>
> Bey: *** if you read me those rights, you must be gonna charge me with something. So I'll wait and see what happens. I won't say another word until I have an attorney.
>
> D: Well, like you say yourself, James, you're a suspect.
>
> Bey: Well, if I'm being charged with something, I'd rather not have anything else to say until I have an attorney.
>
> D: Okay?
>
> Let me explain something to you, James. I'm going to continue to ask you questions. Now, you realize that you didn't waive your rights. That means we can't use 'em in court.

[6]In the Transcript, "D" is Detective Bennett; "U" is an "unidentified detective," alleged elsewhere to be Detective Crosby. In the Transcript, Bey is denoted as "B" but his name is spelled out here for ease of understanding. Unintelligible passages in the tape of interview are denoted in the Transcript by asterisks: "***."

U: I think James is familiar with out *** outside Miranda. Are you familiar with that, James?

Bey: I don't — I don't know too much about the law. I'm just telling you I know to keep my mouth shut *** somebody to put me in jail.

D: Well, James, I'll tell you what, there's a lot of physical evidence which doesn't lie, James.

Do you know why we were so long before we got here to talk to you?

Bey: No, I don't. I know that you all were in my apartment looking around. I don't know what you were looking for.

D: Not only looking around. We were in your apartment with our what they call Scientific Investigation Division people, or personnel. These are experts in getting physical evidence.

Bey: Uh-huh.

D: And we got some very incriminating physical evidence, my friend.

Bey: ***

D: Stuff that can't be explained away.

Bey: Well, we'll have to see what happens. But I'm not gonna say nothing *** an attorney ***.

D: Why don't you tell me what happened that night?

Thereafter, Bey admitted that the murder victim had been in his apartment on the night she was killed, and that she had

previously "ripped him off" of small amounts of money. He also made various other statements about the evening in question, although he denied committing the murder. Bey stated in his deposition that Detective Bennett appeared angry at times during the interview, spoke loudly, made threatening gestures, and adopted a "condemnatory" tone.

At trial, Bey testified and his statement was used to impeach him. He was convicted of first degree murder. On appeal, the state court of appeal, after reviewing the uncontradicted evidence, stated: "We . . . are compelled to conclude that under these circumstances, appellant's statements were coerced and involuntary, and should not have been introduced to impeach his trial testimony." *People v. Bey*, 27 Cal. Rptr. 2d 28, 31 (1993). The court held the error to be harmless, however, and affirmed the conviction. *Id.* at 32.

DISCUSSION

There can be little question that the insistence of the above interrogators on questioning after invocation of the right to silence and unequivocal requests for counsel violated the strictures of *Miranda* and did so intentionally. The defendants contend, however, that they are nevertheless entitled to qualified immunity because reasonable officers in their position could have believed that their interrogation did not violate "clearly established rights" of McNally and Bey. *See Anderson v. Creighton*, 483 U.S. 635, 638-39 (1987). Their contention is based on three propositions, all of which we reject: (1) that McNally and Bey have not alleged violation of a constitutional right; (2) that the right was not clearly established, in light of subsequent qualifications of *Miranda*; and (3) that the defendants could reasonably rely on training materials endorsing questioning "outside *Miranda*." We address these contentions in turn.

The Constitutional Right

[1] The first question is whether McNally and Bey have alleged the violation of a constitutional right at all. *See*

County of Sacramento v. Lewis, 118 S. Ct. 1708, 1714 n.5 (1998). The defendants contend that *Miranda* is a prophylactic rule, not a constitutional right. In the narrowest sense, this contention is correct: there is no constitutional right to the *Miranda* warnings themselves. *New York v. Quarles*, 467 U.S. 649, 654 (1984). But *Miranda* rights are brigaded with the right against self-incrimination and supply " 'practical reinforcement' for the Fifth Amendment right." *Id.* (quoting *Michigan v. Tucker*, 417 U.S. 433, 444 (1974)). Indeed, the connection between *Miranda* and the constitutional right against self-incrimination is demonstrated by the fact that *Miranda* reversed a state court judgment, even though the Supreme Court observed that it "might not find the defendants' statements to have been involuntary in traditional terms." *Miranda*, 384 U.S. at 457. The Supreme Court has continued to enforce *Miranda* in both direct and habeas corpus review of state court judgments. *See, e.g., Minnick v. Mississippi*, 498 U.S. 146 (1990) (direct review); *Withrow v. Williams*, 507 U.S. 680 (1993) (habeas corpus). The Supreme Court's review of state judgments is confined, of course, to constitutional issues; it has no power to enforce mere supervisory rules on the States. *Mu'Min v. Virginia*, 500 U.S. 415, 422 (1991). Thus *Miranda* cannot be viewed entirely apart from the constitutional rights that it protects.

The defendants argue, however, that all of these cases deal with the *admission* of statements taken in violation of *Miranda*; they do not deal with a right against questioning apart from use of the statements at trial.[7] It is very difficult, however, to read *Miranda* that way:

[7]There is a certain perversity in this argument. The exclusionary rule is strong and unpleasant medicine that can keep probative evidence from the jury. The primary reason for employing the rule, with all its disadvantages, is that it is normally the most effective way to achieve the overarching goal of controlling police behavior that threatens the constitutional rights of individuals. *See, e.g., Elkins v. United States*, 364 U.S. 206, 217-18 (1960). It makes no sense to hold that other means of controlling police behavior ought not to be permitted because the exclusionary rule, though ineffective for the purpose, is in place.

> Today, then, there can be no doubt that the Fifth Amendment privilege is available *outside of criminal court proceedings and serves to protect persons in all settings* in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves. We have concluded that without proper safeguards the process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and *the exercise of those rights must be fully honored.*

Miranda, 384 U.S. at 467 (emphases added). This language focuses on rights of individuals *at interrogation.*

In any event, we have squarely rejected the defendants' contention in *Cooper v. Dupnik*, 963 F.2d 1220, 1251 (9th Cir. 1992) (en banc). "It is wrong . . . to relegate [the warning of the right to remain silent] to the status of 'only a prophylactic device': It is a prophylactic device, but it expresses a substantive right." *Id.* at 1240. In *Cooper*, we rejected a claim of qualified immunity asserted on behalf of officers who had interrogated a suspect who was never tried. We held that the request for an attorney is an "invocation of the substantive right to remain silent." *Id.* We held that the decision to interrogate Cooper despite his requests for an attorney, and to persist until Cooper broke down (even though he never confessed), was coercive and violated Cooper's constitutional rights. "It is irrelevant that Cooper's coerced statements were never introduced against him at trial. The Task Force's

wrongdoing was complete at the moment it forced Cooper to speak." *Id.* at 1237.[8]

[2] The defendants seek to distinguish *Cooper* on the ground that the nature of the questioning there was far more intimidating and coercive than that directed at McNally and Bey. They rely on *Cooper*'s point that a bare violation of *Miranda* is not enough to sustain a claim under § 1983:

> This case does not establish a cause of action where police officers continue to talk to a suspect after he asserts his rights and where they do so in a *benign way, without coercion or tactics that compel him to speak.* What we do confront is a case laden with police misconduct that is "identical with the historical practices [of incommunicado interrogation] at which the right against self-incrimination was aimed."

Cooper, 963 F.2d at 1244 (emphasis added) (quoting *Tucker*, 417 U.S. at 444). But coercion has been claimed and the question whether it occurred remains to be tried; the district court held that McNally and Bey had raised a material issue of fact on that point, and denied summary judgment.[9] The district court's ruling is not surprising, in light of the fact that the state trial court suppressed McNally's statement even for impeachment purposes, and the state appellate court expressly concluded that Bey's statement was coerced. The district court was well aware of the distinction reflected in the above quotation from *Cooper*, but it also recognized that a failure to

[8]Thus McNally's and Bey's claims are not defeated by the fact that their statements may not have caused them harm at their trials; they seek redress for violations of their rights in the jail or stationhouse, not in the courthouse.

[9]McNally and Bey moved for summary judgment on their claim; the district court denied the motion. That denial of summary judgment, of course, is not subject to interlocutory appeal and is not before us. *See* 28 U.S.C. § 1291.

comply with *Miranda* can be viewed as an aggravation of other coercive tactics. *California Attys. for Criminal Justice v. Butts*, 922 F. Supp. 327, 336 & n.13 (C.D. Cal. 1996); *see Collazo v. Estelle*, 940 F.2d 411, 418 (9th Cir. 1991). Indeed, in recently holding a confession to have been coerced, we placed great emphasis on the fact that officers had ignored a request for counsel and had misrepresented that any statement thereafter made could not be used in court. *See Henry v. Kernan*, 177 F.3d 1152, 1158 (9th Cir. 1999). In any event, the nature and effect of the defendants' tactics in this case are yet to be resolved by the trier of fact. To the extent that the defendants' claim of immunity depends upon unresolved and genuine issues of fact, it is not appropriate for review on this interlocutory appeal. *See Johnson v. Jones*, 515 U.S. 304, 319-20 (1995); *Behrens v. Pelletier*, 516 U.S. 299, 312-13 (1996).

The Right is Clearly Established

[3] To be "clearly established" for the purpose of overcoming qualified immunity, "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640. *Miranda* could scarcely be more clear in stating that, once a suspect "indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, *the interrogation must cease*," and that if he "states that he wants an attorney, the interrogation *must cease until an attorney is present*." *Miranda*, 384 U.S. at 473-74 (emphases added). *See also Davis v. United States*, 512 U.S. 452, 458 (1994); *McNeil v. Wisconsin*, 501 U.S. 171, 176 (1991); *Minnick*, 498 U.S. at 152. The rule under these decisions is unmistakable. As we held in *Cooper*, "[t]here is no question that the Constitutional holding in *Miranda* is 'clearly established' law." *Cooper*, 963 F.2d at 1237.[10]

[10]Defendants also point out that *Cooper* was the first case that allowed recovery under § 1983 for interrogation "outside" Miranda. Accordingly,

[4] There is equally no question that reasonable officers in the defendants' position would know that their actions violated McNally's and Bey's *Miranda* rights. McNally and Bey both invoked their rights to speak to an attorney, in a manner indicating that they did not want the interrogation to proceed without such a consultation. The detectives deliberately ignored these requests. Yet, "[t]he *per se* aspect of *Miranda* was . . . based on the unique role the lawyer plays in the adversary system of criminal justice in this country." *Fare v. Michael C.*, 442 U.S. 707, 719 (1979). The detectives in McNally's case nevertheless attempted to discourage him from seeking counsel, implied that his situation would become much worse if he spoke with an attorney, and assured him that whatever he said could not be used against him in any way. After telling McNally several times that anything he said thereafter could not be used against him, one of the detectives inserted "in the case in chief," with no explanation of what that term meant. This unexplained qualification, which McNally has asserted he did not understand, cannot overcome the many untrue and unqualified statements that preceded it.[11]

---

because *Cooper* was decided after these interrogations, the detectives argue that they were not on notice that their conduct was unconstitutional. This argument misunderstands both *Cooper* and the qualified immunity analysis. First, in *Cooper* we did not *establish* that this conduct is unconstitutional — we *recognized* it. We held that Cooper's rights were clearly established *at the time of his interrogation in 1986* — years before the interrogation of McNally and Bey. *Cooper*, 963 F.2d at 1237 ("Appellants knew [in 1986] that they were violating the Constitution.") Second, even without an analogous case, the Supreme Court "and our case law do not require that degree of specificity." *Hyland v. Wonder*, 117 F.3d 405, 412 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1166 (1998). It is not necessary that a case has previously declared the very conduct in question unlawful. We only require that the "unlawfulness must be apparent." *Id.*; *see also Anderson*, 483 U.S. at 640.

[11]We recognize that subterfuge may be used in interrogating suspects, but misstating the legal use that can be made of their statements is not a permissible form of subterfuge. *Miranda* requires that suspects be advised that their statements can be used against them, *see Miranda*, 384 U.S. at 469; it can hardly countenance false advice that the statement *cannot* be used against them.

In Bey's case, the interrogator told Bey that he was going to continue to ask him questions after he asserted his right to remain silent. He went on to advise Bey that because he didn't waive his rights, "[t]hat means we can't use [any subsequent statements] in court." *Bey*, 27 Cal. Rptr. 2d at 30. On appeal, the state court found this to be a "very troubling case, presenting a deliberate police violation of *Miranda* coupled with a misrepresentation to appellant about the legal consequences of that violation." *Id.* In so continuing interrogation and misinforming McNally and Bey concerning the legal effects of that interrogation, the defendants clearly violated the *Miranda* imperatives, thereby creating a danger of coercion as well as a presumption of it. *See Oregon v. Elstad*, 470 U.S. 298, 307 n.1 (*Miranda* violation creates legal presumption of coercion). Nearly identical conduct was one of the major factors leading us to find a confession involuntary in *Henry*, 177 F.3d at 1157.

The defendants contend they could not have known that their conduct violated clearly established rights because of the Supreme Court's rulings that statements taken in violation of the *Miranda* safeguards may be used for purposes of impeachment. *See e.g., Oregon v. Hass*, 420 U.S. 714, 723-24 (1975); *Harris v. New York*, 401 U.S. 222, 226 (1971). They also rely on *Tucker*, in which the Court permitted the testimony of a witness who had been identified by the defendant in an interview preceded by incomplete advice of his rights. *See Tucker*, 417 U.S. at 438; *but see Mincey v. Arizona*, 437 U.S. 385, 398 (1978) ("involuntary" statements not allowed for any purpose). Thus, the defendants argue that they could reasonably believe that it was lawful to continue to press their interrogation, with misleading assurances that any further statements made by McNally or Bey could not be used against them.

Harris and *Tucker* are easily distinguished from the present case; both involved interrogations that preceded the decision in *Miranda*. In *Tucker*, the Supreme Court relied on that

point, as well as on the fact that the police had acted "in complete good faith." *Tucker*, 417 U.S. at 447. The interrogation in *Hass* did succeed *Miranda*, however; the defendant was being driven to the police station, was given *Miranda* warnings, and said he wanted to call a lawyer. He was told he could do so when they arrived, but there was further conversation about the crime during the rest of the trip. *Hass*, 420 U.S. at 715-17. The defendant's statements were held to be admissible for impeachment. *Id.* at 723-24. *Hass* did not appear, however, to involve a conscious decision to continue interrogation in the hope of obtaining impeachment evidence. That officers might so behave was described as a "speculative possibility," but in any event the Court determined to follow *Harris* and permit use of the statement for impeachment. *Id.* at 723.

[5] The Supreme Court has never suggested, however, that these decisions dealing with the peripheral use of statements obtained in violation of *Miranda* somehow overcame *Miranda*'s imperatives concerning proper police procedure. Indeed, the Court has on several occasions, after *Harris*, *Tucker*, and *Hass*, restated those imperatives. In *Fare v. Michael C.*, for example, the Court said:

> Whatever the defects, if any, of this relatively rigid requirement that interrogation cease upon the accused's request for an attorney, *Miranda*'s holding has the virtue of informing police and prosecutors with specificity as to what they may do in conducting custodial interrogation, and of informing courts under what circumstances statements obtained during such interrogation are not admissible.

Fare, 442 U.S. at 718. The Supreme Court later canvassed the *Miranda* progeny in *Edwards v. Arizona*, 451 U.S. 477 (1981), stating:

> We reconfirm these views and, to lend them substance, emphasize that it is inconsistent with

> *Miranda* and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel.

Id. at 485. Again, in *Arizona v. Roberson*, 486 U.S. 675 (1988), the Court observed that "[t]he *Edwards* rule thus serves the purpose of providing 'clear and unequivocal' guidelines to the law enforcement profession." *Id.* at 682. *See also Davis*, 512 U.S. at 458; *McNeil*, 501 U.S. at 177; *Minnick*, 498 U.S. at 151.

[6] These cases indicate that there has been no weakening in *Miranda*'s mandates to protect the *rights* of suspects *during* custodial interrogation. *See, e.g., Michigan v. Mosley*, 423 U.S. 96, 99 (1975) (*Miranda* promulgated "safeguards to protect the . . . constitutional rights of persons subjected to custodial police interrogation."). In the face of these clear and unequivocal directions, reasonable officers in the position of defendants would have understood that they were violating the rights of McNally and Bey in interrogating them in the manner that they did. "Any minimally trained police officer should have known such pressure was improper and likely to produce involuntary statements." *Henry*, 177 F.3d at 1158.

Reliance on Training and Training Materials

[7] The defendants next contend that their reliance on training and training materials entitles them to qualified immunity. The district court rejected this argument holding that "following orders" will only insulate officers from liability when "reliance is objectively reasonable." *Butts*, 922 F. Supp. at 338. The court concluded that a "reasonable person could not reconcile the alleged practice of ignoring the assertion of *Miranda* rights with the commands of *Miranda*, and hence, reliance on the alleged policy cannot be objectively reasonable." *Id.*; *see also Grossman v. City of Portland*, 33 F.3d 1200, 1209 (9th Cir. 1994) ("[I]ndividuals cannot always

be held immune for the results of their official conduct simply because they were enforcing policies or orders . . . .").

[8] The fact that Los Angeles and Santa Monica may have trained their police to violate the rights of individuals does not provide any defense for these officers. Their policy contradicts the safeguards provided by *Miranda*, and, at the very least, is in direct conflict with *Cooper*. Contrary to the assertions by the defendants, *Cooper* did not sanction this technique:

> The primary aggravating circumstance *is the Task Force's purpose* of making it difficult, if not impossible, for a charged suspect to take the stand in his own defense — as Taylor said, "to help keep him off the stand." By forcing Cooper to talk in the police station, the officers hoped to prevent him from being able to do so in the courtroom. We note that their purpose was not just to be able to impeach him if he took the stand and lied, but to keep him off the stand altogether. *This tactic corrupts the doctrine* [the impeachment exception] established in *Harris*.

Cooper, 963 F.2d at 1249 (emphases added) (analyzing whether the police conduct "shocks the conscience"). Furthermore, training officers that inadmissible statements may nevertheless be used for impeachment purposes hardly sanctions this tactic of routinely and intentionally ignoring requests to speak to an attorney. For all of the reasons set forth in the preceding section of this opinion, a reasonable police officer should have known that this conduct was improper and violated the rights of McNally and Bey, whether or not the conduct was endorsed by training materials. Moreover, these officers had discretion over their interrogation methods. Their training did not require officers to interrogate "outside *Miranda*." They acted at their own election.

CONCLUSION

[9] The issue in this case is limited to whether these officers are entitled to qualified immunity as a matter of law. Accepting the facts as presented by McNally and Bey, as we must on summary judgment, *see Behrens*, 516 U.S. at 312-13, we conclude that the district court correctly ruled that the defendants were not entitled to qualified immunity. Officers who intentionally violate the rights protected by *Miranda* must expect to have to defend themselves in civil actions.

The order of the district court denying summary judgment on the ground of qualified immunity is

AFFIRMED.

SCHWARZER, Senior District Judge, Dissenting and Concurring:

I respectfully dissent as to plaintiff James Bey and concur in the judgment as to plaintiff James McNally. *Anderson v. Creighton*, 483 U.S. 635 (1987), tells us that the discretionary acts of government officials are protected by qualified immunity unless

> the right the official is alleged to have violated . . . [has] been 'clearly established.' The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. . . . [That] is to say that in the light of pre-existing law the unlawfulness must be apparent.

Id. at 640. In determining the validity of the qualified immunity claim, therefore, we must look at the state of the law at the time the conduct complained of occurred. *See Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1451 (9th Cir. 1995)

(qualified immunity upheld because right of action under Title IX not clearly established until Supreme Court so decided, subsequent to the complained of conduct).

I. BEY

The majority rests its decision on the proposition that "[o]fficers who intentionally violate the rights protected by Miranda [[by] insistence . . . on questioning after invocation of the right to silence and unequivocal requests for counsel] must expect to have to defend themselves in civil actions." Op. at 13409. Plaintiff James Bey was interrogated on March 8, 1991, by Officers Raymond Bennett and Michael Crosby. On February 6, 1991, one month earlier, a panel of this court decided *Cooper v. Dupnik*, 924 F.2d 1520 (9th Cir. 1991) (*Cooper I*), *rev'd en banc*, 963 F.2d 1220 (9th Cir. 1992) (*Cooper II*). Cooper had brought a § 1983 action against police officers and others alleging various violations of his constitutional rights in connection with his interrogation while in custody. The opinion states that "Cooper contends that his continued interrogation, following his clear and unequivocal request to contact his attorney is a patent violation of the constitution." *Id.* at 1526. It then goes on to firmly reject this contention, reversing the denial of qualified immunity, stating:

> Although there is no case on point from our circuit, all out-of-circuit cases hold that a plaintiff may not, as matter of law, maintain a section 1983 action based upon the failure by the police to issue Miranda warnings. [Citations omitted.] . . . These cases are not precisely on point, since in the instant case the police gave the Miranda warnings but refused to allow Cooper to exercise his rights. But the reasoning of these cases does apply—since Miranda requirements are not a constitutional prerequisite, their violation cannot form the basis of a section 1983 suit. . . . Cooper can cite to no case allowing

> a section 1983 suit under the circumstances of his case.

Id. at 1527-28.[1]

Moreover, the Supreme Court had repeatedly held prior to March 1991 that Miranda's warning requirement is not a dictate of the Fifth Amendment. Thus, in *Connecticut v. Barrett*, 479 U.S. 523 (1987), the Court said:

> It remains clear, however, that this prohibition on further questioning—like other aspects of Miranda—is not itself required by the Fifth Amendment's prohibition on coerced confessions, but is instead justified only by reference to its prophylactic purpose. [Citation omitted.] By prohibiting further interrogation after the invocation of these rights, we erect an auxiliary barrier against police coercion.

Id. at 528. *See also Michigan v. Tucker*, 417 U.S. 433, 444 (1974) (finding "these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected"); *New York v. Quarles*, 467 U.S. 649, 653 & n.3 (1984) (because Miranda is only a "prophylactic" rule, the Court considered a threat to public safety and acknowledged some "limited circumstances where the judicially imposed strictures of Miranda are inapplicable"); *Duckworth v. Eagan*, 492 U.S. 195, 201-03 (1989) (telling a suspect that an attorney will only be appointed if and when the suspect goes to trial does not render the notice constitutionally inadequate because the warnings mandated by Miranda are "procedural safeguards" and "prophylactic," not requiring administration in any exact

[1]The dissenting opinion did not take issue with this reasoning but read the allegations of the complaint as stating a claim for violation of rights secured by the Fifth, Sixth and Fourteenth Amendments. *Id.* at 1538.

form); *Michigan v. Harvey*, 494 U.S. 344, 350-51 (1990) (admitting a statement made without counsel and "not subject to proper Miranda" for impeachment purposes because the violations alleged "relate only to procedural safeguards"). Similarly, the Ninth Circuit prior to March 1991 did not recognize Miranda warnings as a cognizable constitutional right. "Miranda violations do not abridge the Fifth Amendment constitutional privilege against self-incrimination, but instead involve prophylactic standards laid down to safeguard that privilege." *United States v. Patterson*, 812 F.2d 1188, 1193 (9th Cir. 1987).

In declaring that "continued interrogation after a defendant invokes his Miranda right to counsel does not violate the Fifth Amendment," *Cooper*, 924 F.2d at 1528, and "that a violation of Miranda rights is not itself a violation of the constitution," *Id.* at 1527, the opinion in *Cooper I* was consistent with prior Supreme Court and Ninth Circuit law as it stood in 1991. Thus, the rationale of the majority opinion—that the officers violated a clearly established constitutional right by questioning Bey after he invoked his right to silence—cannot stand.[2] Bey argues, however, that this case is not about violation of the Miranda rules, but about coercion in violation of the Fifth Amendment. The question remains whether in 1991 there was clearly established law that the officers' interrogation violated the Fifth Amendment, i.e., when they continued the interrogation despite the suspect's repeated attempts to invoke his Miranda rights, asserted that they could not use his statements in court, and claimed that they possessed incriminating physical evidence. Op. at 13399-400. It is not enough for the court simply to say that such interrogation tactics may be found to

[2]It is true that in *Cooper II*, the court found that the officers knew in 1986 that they were violating the Constitution. 963 F.2d at 1237. Apart from the fact that the conduct involving Bey was substantially different from that involved in *Cooper*, the officers in *Cooper* did not have before them a court of appeals opinion rendered the preceding month that told them that violation of the Miranda rules was not a constitutional violation that could support a § 1983 claim.

be coercive; for qualified immunity to be overcome, the law to that effect must be clearly established. The majority's reliance on the Miranda rules on this issue is a bootstrap argument for, as noted, those rules do not establish a constitutional right. The Court's statement in *Anderson v. Creighton*, 483 U.S. 635 is apposite: "[I]f the test of 'clearly established law' were to be applied at this level of generality, it would bear no relationship to the 'objective legal reasonableness' that is the touchstone of *Harlow*[*v. Fitzgerald*, 457 U.S. 800 (1982)]." *Id.* at 639. *Anderson* requires that "in the light of pre-existing law the unlawfulness must be apparent." *Id.* at 640. Because there was no such law in 1991, defendants' qualified immunity motion as to Bey's claims should have been granted.

II. McNALLY

Plaintiff James McNally was interrogated by Officers Ray Cooper and Shane Talbot on March 2, 1993. *Cooper II* had been decided on May 5, 1992, ten months earlier. In *Cooper II*, an *en banc* panel of this court reversed *Cooper I* and found interrogation "that was involuntary *because it was actively compelled and coerced* by law-enforcement officers during in-custody questioning" can form the basis for a § 1983 action against the police officers who interrogated him. *Cooper*, 963 F.2d at 1243. The limits of *Cooper II*'s holding, as relevant to this case, are encapsulated in the following statement: "This case does not establish a cause of action where police officers continue to talk to a suspect after he asserts his rights and where they do so in a benign way, without coercion or tactics that compel him to speak." *Id.* at 1244. It is plain, therefore, that *Cooper II* does not establish law that supports the majority opinion's broad rationale that "the insistence of the . . . interrogators on questioning after invocation of the right to silence and unequivocal requests for counsel violated the strictures of Miranda" and thereby barred qualified immunity. Op. at 13399. Before a constitutional violation can be found, there must be more than a Miranda infraction—there

must be coercive tactics that compel the suspect to speak in violation of the Fifth Amendment. *Id.* at 1243-1244.

The question is what tactics, in 1993, were clearly established by law to be coercion violating the Fifth Amendment. The majority summarizes the conduct of the officers as "attempt[ing] to discourage [McNally] from seeking counsel, impl[ying] that his situation would become much worse if he spoke with an attorney, and assur[ing] him that whatever he said could not be used against him in any way." Op. at 13404.[3] In July 1991, this court held substantially similar questioning of a suspect to be coercion violating the Fifth Amendment. *Collazo v. Estelle*, 940 F.2d 411 (9th Cir. 1991) (*en banc*). The critical colloquy between Detective Destro and defendant Collazo, after Collazo asked if he could speak with a lawyer, went as follows:

> Destro:—Once you get a lawyer, he's gonna say forget it. You know, don't talk to the police. Then it might be worse for you.

[3]Note that Bey's case is different, both on its facts and on its timing. The officers interrogating Bey in 1991 did not denigrate the role of counsel or threaten Bey with harsher treatment as a result of his invocation of his right to remain silent. In contrast, in McNally's interrogation, the detectives repeatedly indicated they would not trust McNally if he chose to consult a lawyer:

> Detective: —[Y]ou have invoked your right to have an attorney.
>
> McNally: —Right.
>
> Detective: —I still would like to know what happened now because—well, I'll tell you where I come from. I don't trust anything that anybody tells me after they've talked to an attorney and the D.A. that will be working with us on this case doesn't either.

The detectives went on to demean the role of counsel at least four more times, saying attorneys "really mess up the system," "fuck your attorney," "It's like black mail with attorneys, man," and "would you trust something that somebody told you after they talked to an attorney?" McNally proceeded to confess to the murder.

Collazo:—Pardon me?

Destro:—Then it might be worse for you.

Id. at 414.[4] The court held that "demean[ing] the pretrial role of counsel," *id.* at 418, in an "attempt to discourage Collazo from speaking to a lawyer," *id.* at 416, "l[eading] Collazo to believe he could reap some legal benefit by excluding defense attorneys from the pre-trial process," *id.* at 418, and "attempt[ing] in the police station to impose a penalty on Collazo's choice to remain silent amount[ed] to a serious infringement of Collazo's Fifth Amendment right." *Id.* at 417. The court concluded that "Officer Destro's overreaching behavior violated not only Miranda, but also the general Constitutional prohibition against coercive interrogation practices likely to result in involuntary responses." *Id.* at 419.

Because it was clearly established, prior to McNally's interrogation, that denigrating the role of counsel and threatening to impose a penalty on a suspect's exercise of his Fifth Amendment rights constitutes coercion violating the Fifth Amendment, Officers Cooper and Talbot are not entitled to qualified immunity. I therefore concur in the judgment affirming the denial of qualified immunity.

---

[4]It was clearly established law in 1993 that a detective during interrogation cannot threaten a suspect with harsher treatment as a result of a suspect's decision to remain silent and not cooperate. *See United States v. Tingle*, 658 F.2d 1332, 1336, n.5 (9th Cir. 1981) ("[I]t is permissible for an interrogating officer to represent, under some circumstances, that the fact that the defendant cooperates will be communicated to the proper authorities, the same cannot be said of a representation that a defendant's failure to cooperate will be communicated to a prosecutor. Refusal to cooperate is every defendant's right under the fifth amendment."). *See also United States v. Guerrero*, 847 F.2d 1363, 1366 & n.2 (9th Cir. 1988) (noting that recommendations of leniency as a result of cooperation are appropriate, but "threatening to inform the prosecutor of a suspect's refusal to cooperate violates her fifth amendment right to remain silent.").

APPENDIX B

I Hereby Certify That This Document Was Served By United States Mail Postage Prepaid, To All Counsel Or Parties At Their Respective Most Recent Address Of Record In This Action On This Date
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Central District of California
By Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CV 95-8634-ER (JGx)

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, et al.,
Plaintiffs,
v.
JAMES BUTTS, et al.,
Defendants.

ORDER RE: CROSS-MOTIONS FOR SUMMARY JUDGMENT ARGUED AUGUST 11, 1997

On August 11, 1997, the following motions came on for hearing before the Honorable Edward Rafeddie in Courtroom 1: Plaintiffs' Motion for Summary Judgment, the Santa Monica Defendants' Motion for Summary Judgment, and the Los Angeles Defendants' Motion for Summary Judgment (joined by the Santa Monica Defendants). Having read and carefully considered the papers filed in support of and in opposition to these motions, as well as the two briefs filed by amicus curiae, and having considered oral argument of counsel, the Court now HEREBY RULES as follows:

[1] On a motion for summary judgment, the Court must view all facts and draw all inferences in the light most favorable to the non-moving party.

[2] The Court DENIES Plaintiffs' and all Defendants' motions for summary judgment on Plaintiffs' claim that Defendants violated their Fifth Amendment right to be free from self-incrimination during custodial interrogation. The Court has carefully considered *Miranda v. Arizona*, 86 S.Ct. 1602 (1966), and its progeny, as well as the Ninth Circuit's en banc decision in *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992) (en banc), cert. denied, 113 S.Ct. 407 (1992). The Court believes that there is a genuine issue of material fact as to whether or not Plaintiffs McNally and Bey were coerced into speaking by police officers

during custodial interrogation, in violation of Plaintiffs' Fifth Amendment right against self-incrimination. As *Cooper* makes clear, a mere violation of *Miranda* is not, without more, a violation of the Fifth Amendment. After invocation, detectives may still speak with a suspect "in a benign way, without coercion or tactics that compel him to speak." *Cooper*, 963 F.2d at 1243-44. However, when *Miranda* measures are ignored, a suspect's Constitutional rights are "directly affected." *Collazo v. Estelle*, 940 F.2d 411, 418 (9th Cir. 1991), cert. denied, 112 S.Ct. 870 (1992). A failure to comply with *Miranda* can be viewed as an aggravation of other coercive tactics. *Id.*

[3] Absent proper safeguards, custodial interrogation is fraught with "inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." *Miranda*, 86 S.Ct. at 1624. In McNally's case as well as in Bey's case, the detectives purposely continued to question Plaintiffs after they had invoked their rights to silence and to counsel under *Miranda*. The detectives interrogating McNally explicitly demeaned the role of defense counsel when McNally invoked his right to an attorney. In each case, the interrogating detectives told Plaintiffs that their post-invocation statements could not be used against them. In each case, however, Plaintiffs' statements were

ultimately used against them by prosecutors.[1] These facts raise a genuine issue of material fact as to whether or not the detectives' questioning was coercive or merely benign, in the language of *Cooper*, 963 F.2d at 1243-44.[2] The Fifth amendment claim, therefore, is appropriate for resolution before a jury, on a fully developed record.

[4] Plaintiffs and all Defendants also move for summary judgment on Plaintiffs' claims that Defendants violated their Fourteenth Amendment substantive due process rights (1) to be free from conduct overbearing their will, and (2) to be free

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[1] Plaintiff McNally filed a successful motion to suppress the use of his statement by the prosecution at trial for the purpose of impeachment. However, McNally's statement was used against him by the prosecution at his sentencing hearing. Plaintiff Bey's statement was used against him at trial for the purpose of impeachment. In neither McNally's case nor in Bey's case were the statements used by the prosecution in its case-in-chief.

The California Court of Appeal has ruled that Plaintiff Bey's post-arrest statement taken during custodial interrogation and in violation of *Miranda* was "coerced and involuntary," but that admission of the statement at trial to impeach Bey was harmless error in light of the overwhelming evidence of Bey's guilt. *People v. Bey*, 27 Cal. Rptr. 2d 28, 31-32 (Cal. App. 2 Dist. 1993).

[2] The Court views the Defendants' after-the-fact arguments that the detectives somehow conferred "de facto use immunity" on these suspects to be without merit.

from behavior that "shocks the conscience" during interrogation.

[5] The Court DEFERS RULING on the Fourteenth Amendment claim for conduct overbearing the will. The parties are referred to *Albright v. Oliver*, 114 S.Ct. 807 (1994), and should consider whether, in light of *Albright*, Plaintiffs' generalized Fourteenth Amendment substantive due process claim must yield to the Fifth Amendment claim, which appears to provide the "explicit textual source of constitutional protection against . . . government behavior" at issue in the present case. *Albright*, 114 S.Ct. at 813. Accordingly, the parties may file any appropriate motions within ten (10) days of the date of this Order.

[6] The Court GRANTS all Defendants' motions for summary judgment on the Fourteenth Amendment "shocks the conscience" claim, and DENIES Plaintiffs' motion for summary judgment on that claim. There is no evidence of behavior "shocking to the conscience" in either case, or of conduct that is "intentional, unjustified, brutal, and offensive to human dignity," or that constitutes force that is "brutal" and "offends even hardened sensibilities." *Rutherford v. City of Berkeley*, 780 F.2d 1444, 1446 (9th Cir. 1986).

[7] The Court DENIES the Santa Monica and Los Angeles detectives' motions for summary

judgment on the basis of qualified immunity. The Court believes this defense is foreclosed by the analysis set forth in *Cooper v. Dupnik*, 963 F.2d at 1250-51. The law that police officers may not coerce criminal suspects into making incriminating statements during custodial interrogations is "clearly enough established to alert a reasonable officer to its constitutional parameters." See *Miranda*, 86 S.Ct. at 1624; *Reynolds v. County of San Diego*, 84 F.3d 1162, 1167 (9th Cir. 1996). Defendants have articulated no reason for this Court to alter its preliminary denial of the qualified immunity defense, as articulated in the Court's Memorandum Opinion issued in connection with the motion to dismiss. *CACJ v. Butts*, 922 F.Supp. 327, 337-38 (C.D. Cal. 1996).

[8] The Court DENIES Plaintiffs' and all Defendants' motions for summary judgment on Plaintiffs' claims under *Monell v. Dep't of Social Services*, 98 S.Ct. 2018 (1978). There is a genuine issue of material fact as to whether or not the Santa Monica and Los Angeles Police Departments have a custom or policy of denying criminal suspects their Fifth Amendment right against self-incrimination during custodial interrogations through coercive questioning. Although the "outside *Miranda*" training materials relied upon by each Department inevitably recommend that detectives proceed in a non-coercive fashion, the Court believes that a jury should be left to draw its

own inferences as to whether there was a policy or custom to violate Fifth Amendment rights, and whether the "outside *Miranda*" training materials and classes reflected deliberate indifference to constitutional rights. For the same reasons, the Court DENIES Chief Butts' motion for summary judgment in his individual and official capacities.

[9] The Court DENIES the Santa Monica Defendants' motion for summary judgment on Plaintiff McNally's damages claims. Plaintiff McNally has stated claims for money damages that may go to a jury, and the Court does not believe that a finding on Plaintiff's behalf would necessarily imply the invalidity of his conviction or sentence under *Heck v. Humphrey*, 114 S.Ct. 2364 (1994).

[10] The Court also DENIES WITHOUT PREJUDICE the Santa Monica Defendants' motion for summary judgment on the ground that Plaintiff McNally has improperly invoked the Fifth Amendment privilege in these civil proceedings in response to discovery requests concerning the underlying murder case. The Court does not believe that Defendants have shown prejudice at this time.

[11] The Court DENIES Plaintiff McNally's motion to strike the declarations of Marianne Fullove, Raymond Hill, Jeffrey Semow, Joel Carey, and Richard Tyler; as well as Exhibits H, L, M, N, and Q. There are conflicting allegations as to

when this admittedly late-disclosed evidence became available to Plaintiff. More importantly, the Court did not rely on these materials in reaching its ruling. The Santa Monica Defendants' objections to the amicus brief of the National Association of Criminal Defense Lawyers are OVERRULED.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by telefax or by United States mail, copies of this Order on counsel for the parties in this matter.

Dated: Aug. 26, 1997

/S/Edward Rafeedie
EDWARD RAFFEDIE
Senior United States District Judge

APPENDIX C

Filed
October 15, 1997
Clerk, U.S. District Court
Central District of California
By Deputy

Entered
Clerk, U.S. District Court
October 16, 1997
Central District of California
By Deputy

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CV 95-8634-ER (JGx)

CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE, et al.,
Plaintiffs,
v.
JAMES BUTTS, et al.,
Defendants.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY ADJUDICATION; DENYING PLAINTIFFS' MOTION FOR CERTIFICATION FOR INTERLOCUTORY APPEAL; AND GRANTING DEFENDANTS' REQUEST FOR STAY PENDING APPEAL ON QUALIFIED IMMUNITY ISSUE

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

On September 29, 1997, the following motions came on for hearing before the Honorable Edward Rafeedie in Courtroom 1: the Los Angeles Defendants' Motion for Summary Adjudication (joined by the Santa Monica Defendants), the Plaintiffs' Motion for Certification for Interlocutory Appeal (joined in part by all Defendants), and the Los Angeles Defendants' Request for Stay Pending Appeal Re: Qualified Immunity (contained within its Opposition to Plaintiff's Motion for Certification). Having read and carefully considered the papers filed in support of and in opposition to these motions, and having considered oral argument of counsel, the Court now HEREBY RULES as follows:

[1] The Court GRANTS all Defendants' motion for summary adjudication regarding Plaintiffs' Fourteenth Amendment Substantive Due Process claim for conduct "overbearing the will."

[2] The sole issue in this motion for summary adjudication concerns a question of law, and requires the Court to determine whether a cognizable Fifth Amendment claim for self-

incrimination bars a concomitant Fourteenth Amendment Substantive Due Process claim for conduct "overbearing the will." In deciding whether the former precludes the latter, the Court considered the Ninth Circuit's decision in *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992), the United States Supreme Court's decision in *Albright v. Oliver*, 114 S. Ct. 807 (1994), and other cases independently researched by the Court.

[3] In *Cooper v. Dupnik*, 963 F.2d 1220 (9th Cir. 1992), the Ninth Circuit sitting *en banc* stated in a footnote that "[b]ecause statements of an accused continue to be analyzed under *both* the Fifth and Fourteenth Amendments, and because *Rochin*'s theory of § 1983 liability is still viable, Cooper is entitled to avail himself of all three theories." *Id.* at 1244 n.11 (emphasis added). The Ninth Circuit's decision in *Cooper* remains the last word on the viability of Fourteenth Amendment Substantive Due Process claims in cases where the Court finds a cognizable Fifth Amendment claim for self-incrimination occurring during an interrogation. The question this Court address is whether the statement in *Cooper*'s footnote is still good law after the Supreme Court's decision in *Albright v. Oliver*. The Court ultimately concludes that it is not.

[4] *In Albright v. Oliver*, 114 S. Ct. 807 (1994), the plaintiff brought a Section 1983 lawsuit claiming that a malicious prosecution

deprived him of Substantive Due Process under the Fourteenth Amendment . . . to be free from criminal prosecution except upon probable cause." *Id.* at 810-11. A plurality of the United States Supreme Court held that to the extent the Constitution gave rise to a malicious prosecution claim, the plaintiff's right to redress the grievance fell solely within the more specific provisions of the Fourth Amendment and not under the more generalized Substantive Due Process protections of the Fourteenth Amendment. *Id.* at 813. Although the Court's decision was rendered by a plurality, its general principles, explained in the paragraphs below, are held by a majority of the Court.

[5] As a general matter, the Supreme Court has "always been reluctant to expand the concept of Substantive Due Process because the guideposts for responsible decision making in this uncharted area are scarce and open-ended." *Collins v. Harker Heights*, 112 S. Ct. 1061, 1068 (1992). "The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity. *Albright*, 114 S. Ct. at 812.

[6] Thus, the Supreme Court has stated that claims alleging Substantive Due Process violations are often more appropriately analyzed under the more specific guarantees of the various

provisions of the Bill of Rights. *Id.* at 813. "Where a particular amendment [to the Constitution] provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, [and] not the more generalized notion of substantive due process, must be the guide for analyzing these claims." *Id.* (citing *Graham v. Connor*, 109 S. Ct. 1865, 1871 (1989)) (internal quotation marks omitted). The Court should "reverse[] due process for otherwise homeless substantial claims" so as to avoid "unnecessary duplication in constitutional adjudication." *Albright*, 114 S. Ct. at 820 (Souter, J., concurring).

[7] The Ninth Circuit recently adopted the narrow Substantive Due Process philosophy enunciated in *Albright* in an *en banc* decision entitled *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). In *Armendariz*, the owners of low-income housing properties brought a 42 U.S.C. § 1983 action against city officials, alleging that conducting sweeps and over-enforcing housing codes for the purpose of relocating criminals violated Substantive Due Process and Equal Protection. The Ninth Circuit rejected the Substantive Due Process claim on the ground that the Fourth and Fifth Amendments provided protection against the kind of governmental behavior challenged in the case. In doing so, the Court referred to *Albright v. Oliver* and stated that "[s]ubstantive due process analysis has no place in

contexts already addressed by explicit textual provisions of constitutional protection, regardless of whether the plaintiff's potential claims under those amendments have merit." *Id.* at 1326. The Ninth Circuit would not allow the plaintiff to "seek relief under multiple constitutional theories" where one of the theories involves Substantive Due Process. *Id.* Although the decision in *Armendariz* does not squarely address Fifth Amendment self-incrimination claims, it certainly calls into question the validity of *Cooper*'s statement in footnote 11.[1]

[8] In the present case, the Fifth Amendment to the United States Constitution provides explicit protection for the alleged government conduct. The Fifth Amendment states in relevant part that "no person shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. The language of the Fifth Amendment in no uncertain terms

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[1] The Court also notes that a number of decisions in other jurisdictions have already extended *Albright*'s preclusion principle to other amendments to the Constitution. See, e.g., *Kaluczky v. City of White Plains*, 57 F.3d 202, 211 (2d Cir. 1995) (extending to First Amendment free speech and association claim); *Rubin v. Ikenberry*, 933 F. Supp. 1425, 1433 (C.D. Ill. 1996) (same); *Patel v. Penman*, 103 F.3d 868, 875 (9th Cir. 1996) (extending to Fifth Amendment Takings Clause); *Holman v. Page*, 95 F.3d 481, 485 (7th Cir. 1996) (extending to Eighth Amendment cruel and unusual punishment).

protects persons from the same kind of government conduct alleged in this case, namely compelling one to give testimonial, self-incriminating evidence. Plaintiffs' generalized Substantive Due Process claim does not add a "substantive increment" to the protection available under the Fifth Amendment. Quite the contrary, Plaintiffs' claim for conduct "overbearing the will" rings remarkably similar to the first requirement of a Fifth Amendment claim, that the person's testimony be "compelled." In this sense, the protections of the Fifth Amendment subsume any protections afforded by the Fourteenth Amendment.

[9] Altogether, in light of the Supreme Court's decision in *Albright* and its progeny, and the clear and unequivocal protections afforded by the Fifth Amendment for the grievance claimed in this case, the Court concludes that Plaintiffs' Fourteenth Amendment Substantive Due Process claim cannot proceed as a matter of law.

[10] The Court DENIES any and all requests for certification of issues for interlocutory appeal. The Ninth Circuit has set a high hurdle for granting 28 U.S.C. § 1292(b) certification, noting that it is only to be used in "extraordinary cases where decision of an interlocutory appeal might avoid protracted and expensive litigation. It was not intended to provide review of difficult

rulings in hard cases." *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966).

[11] This case is not so extraordinary so as to merit sending any issues on appeal. Many of the issues sought to be certified are ones that this Court has already ruled involve triable issues of fact. Being that the Ninth Circuit Court of Appeals will not be able to address these issues until a full record is first created by the District Court, certifying issues of fact to the Ninth Circuit will not "materially advance the ultimate termination of the litigation." Moreover, any remaining issues involving questions of law, do not pose, contrary to the parties' contentions, "substantial ground for difference of opinion." Although the parties may disagree with the Court's rulings on these issues of law, the resolution of each issue was supported by established precedent. See *CACJ v. Butts*, 922 F. Supp. 327 (C.D. Cal. 1996); Aug. 26, 1997 Order Re: Summary Judgment.

[12] Finally, the Court GRANTS the individual Defendant Police Officer's Request for a Stay of this Court's proceedings pending the outcome on appeal on the issue of qualified immunity.

[13] Each individual defendant may immediately appeal the Court's denial of summary judgment on qualified immunity. *Behrens v.*

Pelletier, 116 S. Ct. 834, 838-39 (1996). Generally, such an appeal operates to automatically stay the trial in the District Court. *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992); *Behrens*, 116 S. Ct. at 841. The District Court need not stay proceedings, however, if the District Court certifies in writing that the immunity appeal is frivolous. *Id.* But the power to certify an appeal is frivolous "must be used with great restraint." *Apostol v. Gallion*, 870 F.2d 1335, 1339 (7th Cir. 1989).

[14] The Court finds that the issue of qualified immunity in this case is not frivolous. A government official is "entitled to qualified immunity only if he is performing discretionary functions and if his conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 102 S. Ct. 2727, 2738 (1982). In the present case, a colorable argument may be made that it is not clearly established that questioning "outside" of *Miranda*, where *Miranda* warnings were actually given, violates the Fifth Amendment to the Constitution.

IT IS SO ORDERED.

IT IS FURTHER ORDERED that the Clerk of the Court shall serve, by telefax or by United

States mail, copies of this Order on counsel for the parties in this matter.

Dated: Oct. 15, 1997

/S/Edward Rafeedie
EDWARD RAFEEDIE
Senior United States District Judge

APPENDIX D

[Parties' Stipulation of Facts Regarding Training Methods from Ninth Circuit Excerpt of Records, pp.254-256]

STIPULATION

Plaintiff James McNally and Defendants City of Santa Monica, James T. Butts, Jr., Ray Cooper and Shane Talbot stipulate to the following facts:

1. Police Departments in the State of California are regulated by the Commission on Peace Officer Standards and Training (POST). California Penal Code § 13500 et seq. The POST commission establishes minimum standards for training of peace officers in the State.

2. The Santa Monica Police Department is a relatively small department with approximately 195 sworn police officers. Unlike some of the larger departments in the State of California, Santa Monica's police department does not have its own police training academy. All police officers receive POST certified academy training and attend the City's 20 week field training program.

3. Every Santa Monica police officer continues to receive training on a wide variety of subjects throughout his or her career with the City of Santa Monica. The type and substances of

training depends upon the officer's rank and assignment. Training includes formal classroom training, rollcall training and training bulletins. The training bulletins are prepared by the training department and approved by the Chief of Police prior to circulation within the department. Most of the formal classroom training is provided by sources outside of the Department such as colleges, institutes, private providers, other police agencies and organizations.

4. The Santa Monica Police Department does not provide in-house classroom training on interrogation techniques. The Department relies upon the training provided at the POST accredited academy and specialized advanced courses offered by outside organizations. Some of these advanced courses are POST accredited and some are not. The Department does not review or approve the substantive content of the training provided in the advanced training courses. If the course is POST accredited, the Department relies on the oversight provided by POST. If the course is not POST accredited, the Department considers the reputation of the course, the course instructors and the course syllabus, if available, in determining whether or not to send police personnel to the course.

5. The Santa Monica Police Department promotes officers to detective positions in the Office of Criminal Investigations based on written

applications and interviews. Detectives conduct virtually all of the custodial interrogations related to felony crimes. Detectives receive advanced instruction for special assignments such as homicide, rape, arson and narcotics. Their training includes advanced instruction in custodial interrogation.

6. Ray Cooper has been employed with the Santa Monica Police Department since 1976. Sergeant Cooper is the detective currently in charge of the Office of Criminal Investigations and held that position since 1991. Prior to 1991, Detective Cooper worked in the Office of Criminal Investigations for 10 years. Sergeant Cooper's duties currently include investigating and supervising investigations related to homicides, deaths, robbery, missing persons, kidnaping, rapes and a variety of other major assaults. His duties also include reviewing reports prepared by detectives in the office of Criminal Investigations, including reports on custodial interrogations conducted by other detectives.

7. Shane Talbot has been employed with the Santa Monica Police Department since 1973. Detective Talbot is currently assigned to the Office of Criminal Investigations and has worked as a detective in that division since 1979.

8. Prior to March 1993, Detectives Cooper and Talbot attended advanced training

courses related to investigative techniques, including custodial interrogation. None of these courses were taught by the Santa Monica Police Department. The instructors at some of these courses taught Detectives Cooper and Talbot that it was permissible to question a custodial suspect after he or she has asserted his or her *Miranda* rights. Pursuant to their training, Sergeant Cooper and Detective Talbot have questioned custodial suspects after they have asserted their *Miranda* rights.

9. Sergeant Cooper and Detective Talbot investigated the homicide involving James McNally. On March 2, 1993, Detectives Cooper and Talbot interviewed Mr. McNally, who was in police custody in Flagstaff, Arizona. A true and correct copy of the transcript of the interview is attached as Exhibit "A".

10. Attached as Exhibit "B" is a copy of a portion of the Santa Monica Police Department's Policy and Procedure Manual related to *Miranda* admonishments. This policy was in effect in March 1993.

11. There are three training bulletins signed by Santa Monica Chief of Police James T. Butts related to *Miranda*. All three bulletins were signed after March 1993, when Sergeant Cooper and Detective Talbot interviewed McNally. Attached as Exhibit "C" is a true and correct copy

of Santa Monica Police Department Training Bulletin, No. 94-02 dated February 2, 1994. Attached as Exhibit "D" is a true and correct copy of Santa Monica Police Department Training Bulletin, No. 95-07 dated January 21, 1995. Attached as Exhibit "E" is a true and correct copy of Santa Monica Police Department Training Bulletin, No. 95-19 dated September 7, 1995.

12. Mr. McNally did not file a personnel complaint pursuant to California Penal Code §§ 832.5 and 832.7 against Sergeant Ray Cooper or Detective Shane Talbot related to the interrogation. And, the Santa Monica Police Department did not discipline either Sergeant Cooper and Detective Talbot as a result of the interrogation.

DATED: April 18, 1997

By: /s/Charles D.Weisselberg
Charles D. Weisselberg

Attorney for Plaintiff
James McNally

By: /s/Jeanette Schachtner
Jeanette Schachtner

Attorneys for Defendants
City of Santa Monica, James T. Butts, Jr.,
Ray Cooper and Shane Talbot

APPENDIX E

[Declaration of Supervising Deputy Attorney General Responsible for Police Officer Training and Author of Department of Justice Legal Sourcebook for the State of California from Ninth Circuit Excerpt of Record pp. 244-249]

DECLARATION OF JOEL E. CAREY

I, JOEL E. CAREY, declare from my own personal knowledge and if called as a witness could and would competently testify to the following:

1. I am a Deputy Attorney General in the California Attorney General's Office in Sacramento and have worked in the Criminal Law Division for approximately 25 years, including 15 years as a Supervising Deputy Attorney General.

2. In addition to my primary responsibility of handling felony appeals for the People before the state's appellate courts, I have had many, ongoing assignments relating to the training of police officers in the areas of search and seizure law and interrogation law. More particularly, I have conducted P.O.S.T. approved training classes and seminars on these topics throughout the state for over 20 years and have been the featured speaker for the past 15 years at the Legal Update seminars sponsored each fall by the California Peace Officers Association. I have also been solely

responsible for the content of the Peace Officers Legal Sourcebook since its inception in 1984. The Legal Sourcebook is a Department of Justice Publication, available in three formats (loose-leaf, computerized, and abbreviated "Field Guild"), which is updated six times a year and is used for training at numerous police academies and colleges throughout the state, as well as by tens of thousands of individual peace officers who want to stay abreast of the law.

3. Within the area of interrogation law, there has been discussion during recent years concerning the issue of "intentional violations" of *Miranda*. Specifically, the discussion relates to continuing to ask questions of (i.e., to "interrogate") a suspect who is in "custody" (i.e., who has either been arrested or subjected to equivalent restraints on his freedom of movement), even though the suspect has invoked his *Miranda* right to silence or his *Miranda* right to counsel.

4. On this topic, I have taught, and continue to teach as follows: As the U.S. Supreme Court has repeatedly stated, the two *Miranda* rights (silence and counsel) are not, themselves, constitutional rights. (*Miranda*, *Tucker*, *Edwards*, *Quarles*, *Duckworth*, *Burbine*, *Davis*). Rather, they are no more than suggested guidelines or recommended procedures on how the police may obtain a statement which will be admissible at trial without violating the suspect's Fifth

Amendment right against self-incrimination. (*Miranda.*)

5. The Fifth Amendment right against self-incrimination is, of course, a constitutional right, but it is a trial right. (*Verdugo-Urquidez*) This means that it is violated, if at all, at trial, i.e., by a judge when he or she admits a statement which was obtained without complying with the *Miranda* safeguards.[1]

6. The Sixth Amendment right to counsel is also a constitutional right. However, it does not attach until the commencement of adversary proceedings (i.e., indictment or the suspect's first court appearance). It serves an entirely different purpose than *Miranda*, and, in general, has absolutely nothing to do with *Miranda*. (*Kirby, Gouveia, Davis*).

7. Because "the prophylactic rules of *Miranda*" are not constitutional rights, and because the whole purpose behind the *Miranda* decision is how an admissible statement may be obtained, the failure to comply with *Miranda*

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[1] As a *trial* right, the Fifth Amendment privilege against self-incrimination stands in stark contrast to the Fourth Amendment right to be free from unreasonable searches and seizures, which exists and all times and places and which is therefore violated "in the field" by an officer who undertakes an unreasonable search or seizure.

results in only one "penalty", namely, a statement that is *not* admissible at trial--at least where the non-compliance with *Miranda* was non-coercive, i.e. where the statement was not involuntary/unreliable through the use of force, threats or promises.

8. Because non-coercive non-compliance with *Miranda* does not involve a constitutional right, there is likewise no civil rights violation, nor any basis for applying *Wong Sun's* "fruit of the poisonous tree" doctrine (*Elstad*). "We decline to hold that the murder weapon should be suppressed as a 'fruit' of a *Miranda* violation." (*Cherry*, 794 F.2d 1040, 1044 (5th Cir. 1986).) "Although the statement itself must be excluded, the physical evidence produced as a result of it is not rendered inadmissible simply because of the *Miranda* violation." (*Henley*, 984 F.2d 1040, 1044 (9th Cir. 1993).) "[T]he United States Supreme Court has stated unequivocally, in *Elstad* and *Tucker*, that a non-coercive *Miranda* violation is not a constitutional violation." (*Whitfield*, 46 Cal.App.4th 947, 957 (1996).)

9. On the other hand, all statements must be "voluntary" in order to be admissible at trial. (*Mincey*, *Benson*) Accordingly, if the police obtain a statement through the use of force, threats or promises, there is a "due process" issue under the

Fourteenth Amendment.[2] If the technique was such as to render the statement involuntary and unreliable, i.e., if the suspect's free will was "overborne" by the police conduct so that the statement was "no longer the product of a rational intellect and free will," then there has been a "substantive" due process violation, and the statement is inadmissible for any purpose. (*Blackburn*, *Mincey*, *Cahill*).

If, on the other hand, the statement was obtained as the result of a non-coercive "promise" (for instance, that the statement will not be used against the suspect), then *if and when the statement is admitted*, there has been only a "procedural" due process violation. The violation results from the inherent unfairness in the State going back on its word even though the promise would not result in an unreliable statement.

In short, "the type of Fourteenth Amendment interest that is implicated has important effects on the nature of the constitutional claim and the availability of Section 1983 relief." (*Daniels v. Williams*, 474 U.S. 327, 337 (1986)).

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[2] Declarant recognizes that the Fifth Amendment also contains a "due process" clause but, for the sake of clarity, will refer only to the Fourteenth Amendment when discussing "due process".

10. In *Harris*, 401 U.S. 222 (1971), the Supreme Court ruled that a statement obtained in non-compliance with *Miranda* can nevertheless be used for impeachment. And in *Hass*, 420 U.S. 714 (1974), non-compliance took the form of putting off the suspect until after he made incriminating statements, even though the suspect had said he wanted an attorney. The Supreme Court followed *Harris* and ruled that the statements were nevertheless admissible for impeachment since the officer had done nothing to render the statement involuntary and untrustworthy:

> One might concede that when proper Miranda warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material. This speculative possibility, however, is even greater where the warnings are defective and the defect is not known to the officer. In any event, the balance was struck in *Harris*, and we are not disposed to change it now. If, in a given case, the officer's conduct amounts to abuse, that case, like those involving coercion or duress, may be taken care

> of when it arises measured by the traditional standards for evaluating voluntariness and trustworthiness. (*Hass* at p. 723)

11. Analytically, since *Miranda* rights are not constitutional rights, it should not make any difference how, or in what manner, the police fail to comply with *Miranda* (excluding any Fourteenth Amendment issue). The result is always the same: Non-coercive non-compliance with *Miranda* renders a statement inadmissible in the case in chief, but leaves it admissible for impeachment purposes. (*Harris*, *Hass*).

12. Likewise, it should not matter why the police did not comply with *Miranda*. The subjective thinking and/or motivation of officers should be as irrelevant under interrogation law as it is under search and seizure law, indeed, probably *less* relevant since no constitutional right is directly involved.

13. As an educator, I do not take a position, one way or another, whether police should or should not ignore a suspect's invocation of *Miranda* rights. Rather, I provide training on established law and apply the relevant principles to various fact patterns, including this one.

14. Attached to this declaration is an excerpt that I wrote and that is contained in the Legal Sourcebook.

I declare under penalty of perjury, pursuant to the laws of the State of California that the foregoing is true and correct.

This Declaration was signed on the May 1, 1997 at Sacramento, California.

/s/Joel Carey
JOEL CAREY
Deputy Attorney General

APPENDIX F

[Declaration of State Certified Trainer in Legal Aspects of Interrogation Law from Ninth Circuit Excerpt of Record at pp. 232-243]

DECLARATION OF RAYMOND HILL

I, RAYMOND HILL, declare and if called as a witness could and would competently testify to the following facts of my own personal knowledge.

1. I am currently a professor of criminal justice and public administration at Santa Rosa Jr. Community College and have held that position since 1981.

2. I received my Bachelor's degree in 1974 and my Master's degree in 1977 from Golden Gate University in San Francisco. I have also completed post graduate work in education.

3. I have taught California police officers and deputy sheriffs about the legal aspects of Miranda for 21 years. I have instructed at the California Community Colleges, at the California State University system, at the Basic Law Enforcement Course and in regional advanced officer training under the auspices of the California Commission on Peace Officer Standards and Training (P.O.S.T.).

I have also provided legal update instruction on *Miranda* issues in advanced officer training through the Santa Rosa Regional Criminal Justice Training Center for law enforcement agencies in Marin, Sonoma, Mendocino, Lake, Humboldt and Solano Counties.

In addition, for 10 years I have instructed a "Legal Aspects of Interrogation Law" block in the P.O.S.T. certified "Interview and Interrogation Techniques" course through the Behavior Analysis Training Institute (BATI) based in Santa Rosa. This course is taught throughout California.

4. Throughout my career as an educator, I have taught interrogation law and techniques to over ten (10) thousand peace officers from the State of California and adjoining states. Approximately 20 officers from the Santa Monica Police Department have attended by training at the BATI "Interview and Interrogation Techniques" course.

5. Prior to entering full-time teaching in 1981, I spent 14 years in law enforcement as a patrol officer, detective and command officer of a detective bureau for the City of Novato in Marin County, California.

6. I am a member of the California Association of Administration of Justice Educators

(CAAJE) and the California Association of Police Training Officers (CAPTO).

7. I have received a nationwide award for "Excellence in Teaching" through the National Institute for Staff Organization and Development at the University of Texas, Austin.

8. I have authored a textbook on California Criminal Evidence which is currently used by 15 colleges in California.

9. I have reviewed the complaint filed by plaintiffs Bey and McNally, the complete interrogation transcript and the District Court's rulings on the defendants' Motions to Dismiss. My teachings vary from the District Court's interpretation of the relevant case law as it relates to civil liability.

10. Historically, instruction on the legal aspects of *Miranda v. Arizona*, 384 U.S. 436 (1966) has been simple. *Miranda* is a court created case law remedy affecting the admissibility of statements gained from a suspect who is subjected to custodial interrogation by the police. If officers comply with *Miranda* prerequisites, any resulting statements are admissible to prove guilt in a criminal case. If peace officers do not comply with *Miranda's* "prophylactic rule", and the court subsequently admits the statement into evidence, a Fifth Amendment violation occurs. In other

words, there is nothing unconstitutional about an officer's failure to comply with the *Miranda* rule (*Michigan v. Tucker*, 417 U.S. 433, 443-444 (1974)); *Moran v. Burbine*, 475 U.S. 412, 424-425 (1986); *Davis v. U.S.*, 129 L.Ed. 362, 370 (1994). The constitutional violation occurs only when the court allows a statement obtained in violation of the *Miranda* rule to be used at trial as evidence of guilt. (*See, Miranda v. Arizona, supra; Illinois v. Perkins*, 494 U.S. 407 (1990). Simply put, I have taught that *Miranda* is not a Constitutional right that applies during police investigation *(Oregon v. Elstad*, 470 U.S. 298, 304 (1985), but rather a trial right to be asserted in court (*Withrow v. Williams*, 123 L.Ed.2d 407, 419 (1993).

Miranda rights can be distinguished from Fourth Amendment protection against unreasonable searches and seizures and from the Sixth Amendment right to counsel (*Michigan v. Jackson*, 475 U.S. 625, 629 (1986); *Moran v. Burbine, supra,* 429-430), both of which are directly guaranteed by the Constitution.

11. My classes include training on questioning outside *Miranda*. My training is consistent with the instructional outline certified through P.O.S.T. and with recommendations made through the California Peace Officer's Legal Source book published through the Office of the Attorney General. (The P.O.S.T. instructional outline is attached as Exhibit " ".)

12. On the subject of questioning outside *Miranda*, I teach as follows:

A. Questioning outside *Miranda* is a discretionary act based upon department and/or the district attorney's office policy. I do not teach officers to automatically question outside *Miranda* nor do I actively encourage or discourage officers from doing so. I educate officers on the law and on the advantages and disadvantages of questioning outside *Miranda*. I always advise officers to refer to their police department and/or the district attorney's office policy for guidance on whether to question outside *Miranda*.

If the police department and/or district attorney policy permits questioning outside *Miranda*, then officers should have the discretion to do so. This is especially true since there is no clear appellate case that holds that questioning outside *Miranda* in a voluntary manner subjects an officer to civil liability in a civil rights action.

B. There are good law enforcement and public policy considerations for questioning outside *Miranda* other than for obtaining impeachment statements. I train officers that statements obtained by police from criminal suspects after the suspect has invoked his or her *Miranda* rights will be inadmissible in the prosecution's case in chief. But, there is a clear body of case law which permits such statements

for impeachment purposes. *(See, Harris v. New York*, 401 U.S. 222, 224 (1971) *Oregon v. Haas*, 420 U.S. 714, 723 (1975); *Michigan v. Harvey*, 494 U.S. 344, 350 (1990); *People v. May*, 44 Cal.3d 309 (1988). These cases recognize that there is substantial public and legal interest in deterring a suspect from committing perjury on the witness stand and to expose such inconsistencies to the trier of fact.

The issue of an intentional or deliberate *Miranda* violation for impeachment statement purposes is currently under review by the California Supreme court (*People v. Peevy*). California appellate courts have split on this issue (*People v. Baker, 220 Cal.App.3d 574, 576-579 (1990);* contra *People v. Bey,* 21 Cal.App.4th 1623, 1628 (1993) and *In re Gilbert E.*, 32 Cal.App.4th 1598, 1601 (1995). The court in *Bey* and *Gilbert E.* ruled the manner in which the officers gained the outside *Miranda* statements involved involuntariness.

From a police "investigative need" standpoint and in order to promote substantial public policy interests, there are numerous reasons police officers might ignore a *Miranda* assertion and question outside *Miranda*. These include:

a.) Locating tangible or physical evidence related to the crime. Derivative evidence seized as

a result of an uncoerced admission or confession obtained outside of *Miranda* is not fruit of the poisonous tree (*Michigan v. Tucker, supra*, 445-450; *Oregon v. Elstad, supra*, 304-308; *People v. Whitfield*, 46 Cal.App.4th 947 (1996), and thus is legally admissible in court. Learning the location of yet to be recovered tangible or physical evidence is not a Constitutional violation.

b.) Locating a crime scene. It is important to locate and secure the crime scene to protect any evidence from contamination or destruction. Such evidence could be exculpatory as well as inculpatory in nature. Also, witnesses who may be able to offer relevant evidence may be located during a neighborhood check around the crime scene. There is no Constitutional violation involved in learning from a suspect the whereabouts of a crime scene.

c.) Identifying another co-principal in the crime. There is a substantial public interest in apprehending or prosecuting other principals involved in a crime. Early discovery of criminal suspects also conserves investigation time and public cost. There is no Constitutional violation involved in learning from a suspect the identity of other persons involved in the crime.

d.) Identifying other victims or witnesses in a crime. There is a substantial interest in aiding a victim or victims to a crime. Especially in

the area of violent crimes, victims may be in need of psychological counseling and are eligible for compensation from the State Victim's Crime Fund. There is no Constitutional violation involved in learning from a suspect who may be a victim or witness to a crime. Such evidence could be exculpatory as well as inculpatory in nature.

e.) Locating stolen property to return to a victim. Often times, a crime victim's property loss is not covered by insurance and the victim's socioeconomic condition does not permit a repurchase of property taken by the thief. There is a substantial public interest in assisting crime victims by returning recovered fruits of the crime.

f.) Learning more about criminal practices and methods of operation. Criminals can be "good teachers" in helping officers and investigators improve their investigative techniques. Criminals are on the "pulse beat" of the illegal subculture in a community and what police learn about criminal practices may in fact deter future crime or accelerate a future investigation.

g.) Providing the Community with "Peace of Mind." -- "Do we have the right guy?" Serial offenders and violent offenders create a state of fear in our communities. In addition, substantial resources are expended investigating these type of crimes. Questioning a serial rape suspect or

violent offender outside *Miranda* may link him or her to specific crimes which allows the police to inform victims that a suspect has been apprehended and mitigate further investigative costs. There is a substantial public interest in putting the community at ease when a dangerous suspect has been apprehended.

C. Questioning outside *Miranda* must be done in a voluntary manner. I train officers that if a suspect voluntarily agrees to talk to a police officer outside *Miranda*, there is no constitutional violation and no civil liability. (*Thornton v. Buchmann*, 392 F.2d 870 (1968); *Duncan v.* Nelson, 466 F.2d 939 (1972); *Turner v. Lynch*, 534 F.Supp. 686 (1982); *Warren v. City of Lincoln, Nebraska*, 864 F.2d 1436 (1989); *Haupt v. Dillard*, 794 F.Supp. 1480 (1992); *Brock v. Logan County Sheriff*, 3 F.3d 1215 (1993); *Giuffre v. Bissell*, 31 F.3d 1994 (1994); *Bennett v. Passic*, 545 F.2d 1260, 1263 (1976). I also train officers that they should document the totality of circumstances surrounding the outside *Miranda* interview in order to establish an atmosphere of voluntariness.

I train officers that if they obtain an outside *Miranda* statement in an involuntary manner through overt tactics such as force, threat, promise of leniency, etc., then the statement is inadmissible in a criminal case for all purposes, including for impeachment. I also instruct that an involuntary statement may also result in the

suppression of tangible or physical evidence resulting from the statement. (*People v. Vasalia*, 38 Cal.App.4th 865, (1995).

That is not to say that every involuntary statement should result in civil liability. For instance, a confession or admission obtained after telling the suspect the statement cannot be used against him or her will result in an involuntary and therefore inadmissible statement. However, this type of police conduct, without more, does not "shock the conscience" and therefore cannot result in a Fourteenth Amendment substantive due process violation. It is important to draw a distinction between police conduct that makes a statement involuntary or coerced for purposes of admissibility in a criminal case versus coercive police conduct that rises to the level of a Constitutional violation under the Fourth or Fourteenth Amendments.

In my training, I also address the 9th Circuit opinion in *Cooper v. Dupnick*, 963 F.2d 1220, 1244 (1992) and discuss the premeditated, coercive, and involuntary factual circumstances which resulted in civil liability in that case. ("What the Task Force did constitutes a 20th century inquisitorial version of the Star Chamber"; "The prisoner was held in a totalitarian nightmare where police no longer obeyed the Constitution, but instead followed their own judgment treating suspects according to their whims".)

D. An outside *Miranda* interview should be memorialized for district attorney and defense counsel review. An officer should have nothing to hide by questioning outside *Miranda* for one or more of the aforementioned investigative motives. The interview should be recorded or documented and attached as part of the investigation in the same manner as any other evidence. The interview should be forwarded to the district attorney and available for discovery by defense counsel.

13. As an expert in the field of interrogation law and techniques, it is my opinion that there are sufficient legal safeguards already in place for a *Miranda* violation. Statements are inadmissible in the prosecution's "case in chief". Involuntary statements which are factually the result of a Fourteenth Amendment due process violation such as coercion or inducement are inadmissible for all purposes (including impeachment and the derivative evidence introduction). Furthermore, conduct which shocks the conscience or violates the Fourth Amendment subjects an officer to civil liability.

14. In my opinion, the mere act of questioning outside *Miranda* in and of itself, without overt coercive circumstances, where a suspect expressly or implicitly agrees to talk to an officer who is pursuing an investigative motive, is a discretionary function. Because there is no clearly established legal precedent to the contrary,

a reasonable law enforcement officer could believe that it is permissible to question outside *Miranda* in a noncoercive manner and that the officer will not be subjected to civil liability unless his or her conduct violates the Fourth Amendment and/or the substantive due process provision of the Fourteenth Amendment.

15. To impose civil liability under section 1983 on a police officer for asking a suspect questions outside *Miranda* is contrary to law enforcement and public policy interests. Moreover, to rule that merely questioning outside *Miranda* is coercive and involuntary, without an additional factual showing of involuntariness which is equivalent to the task force's conduct in *Cooper v. Dupnick*, deters proper and effective law enforcement, runs contrary to the societal interest in assisting crime victims, and subjects the public to bear the expense of defending unnecessary lawsuits.

Under these circumstances, the interests of society should take precedence. If the suspect does not want to talk outside *Miranda,* the choice is simple - he or she can just say no!

16. I have compared McNally's and Bey's allegations with the task force's conduct in *Cooper v. Dupnick.* I have also read the McNally interrogation transcript. And, in my opinion there is absolutely no comparison between the Santa

Monica officer's conduct in McNally and that of the *Cooper* task force. To characterize the task force's conduct in *Cooper* as similar to the officers' conduct in *McNally* is to characterize a "hurricane as but a movement of air." (*Cooper* at 1237.) The Santa Monica officers' questioning of McNally was a "far cry" from the scenario described in *Cooper.* It should also be noted that Bey and McNally are convicted murderers where *Cooper* was in fact an innocent person falsely under arrest.

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct. Signed on May 2, 1997 at Santa Rosa, California.

/s/Raymond Hill
RAYMOND HILL

APPENDIX G

[Petitioner Talbot's Declaration from Ninth Circuit Excerpt of Record at pp. 151-167]

DECLARATION OF SHANE TALBOT

I, SHANE TALBOT, declare that I have personal knowledge of the following facts and if called as a witness I could and would competently testify thereto.

1. I am a police detective employed with the City of Santa Monica Police Department (SMPD), where I have worked since 1973. I have been assigned for 18 years as a detective in the Office of Criminal Investigations. I have been a homicide detective for 12 years. I was the principal investigator assigned to the homicide of James Harold Jones, who was killed in Santa Monica, California in the early morning hours on or about February 28, 1993.

2. On March 1, 1993, police dispatch informed me that a homicide had occurred at 1959 Cloverfield Blvd., Apt. 206, Santa Monica, California. I went to that address about 11:00 a.m.

3. Upon entering the apartment I went to the bedroom, where I observed

James Jones' body lying nude in an unmade bed with numerous stab wounds to his upper right chest and shoulder area and lacerations to his face.

4. Detectives already on the scene informed me that Mr. Jones' car, a 1985 Audi Fox, was missing from its assigned parking space and had been reported to the National Crime Index Center (NCIC) with instructions that, if found, the vehicle should be stopped, all occupants detained, and the car held for latent prints.

5. Mr. Jones' apartment appeared to have been ransacked. Numerous drawers were left open; clothing was removed from bureaus and scattered on the floor, along with articles of jewelry and small change. The stereo system and VCR in the living room were disconnected and readied for carrying.

6. I observed Jones' body lying in an unmade bed in one of the two bedrooms. There was a copious quantity of blood in the bed, but only drops elsewhere in the room or apartment. I examined Jones' body more closely and observed approximately 15 serious stab wounds, four to his back, nine to his front chest and upper right shoulder, and two to the arm pit of his right arm, as

well as lacerations to his face. There was blood splattered on the headboard of the bed, which appeared to be from the victim's body. Semen was identified on the bedclothes.

7. What appeared to be Caucasian body hairs were visible on the bed sheets. The victim, who was African American, had very little body hair.

8. There was a television set and a Video Cassette Recorder in the bedroom with the victim, both in the "on" position when the body was found. An X-rated video depicting homosexual male and heterosexual pornographic activity was in the VCR.

9. Based on my experience as a detective, and the evidence at the scene, including the nude male body in the bed, the bisexual pornographic video, the Caucasian body hairs, the presence of semen, and the degree of physical violence to the corpse, I suspected that this incident may have involved homosexual activity.

10. In my experience as a detective, I have been trained and have observed that in situations involving physical intimacy, an argument or other incident may trigger a

"heat of passion" or rage, resulting in the violent event. That a crime is committed in the "heat of passion" may be a legally mitigating factor in the appropriate charge, or degree of guilt. So I would normally try to assess whether a crime occurred in the heat of passion, or was premeditated.

11. I observed a half-full Budweiser beer can in the living room, with blood on it. This indicated to me that after committing the homicide, the perpetrator stopped to have a beer.

12. I directed the Santa Monica Police Department Identification Technicians (ID techs) to collect and preserve more than 50 items of crime scene evidence for identification and analysis. The ID techs and detectives processed the scene for physical evidence, and diagramed, photographed and videotaped the apartment. They processed the area for fingerprints, and found some that later were matched to those of the suspect, James McNally. The body hairs collected from the bed where the victim lay matched the characteristics of James McNally, plaintiff herein.

13. Photographs attached as Exhibit "G" are true and correct copies of

photographs taken at the crime scene on March 1, 1993, and of James McNally on March 2, 1993. The crime report and supplemental crime reports attached as Exhibit "F" are true and correct copies of the SMPD crime reports of this homicide.

14. I was informed and believed that on March 1, 1993, Santa Monica Police Detective Nick Cicciarelli interviewed Ben Scott, Jr., and Marie Mildred Owens, who resided together in apartment 106, directly beneath the victim's unit. Detective Cicciarelli told me that Scott and Owens heard some noises in the night that sounded like sexual activity, that at or about 1:30 a.m. they heard one muffled cry, then someone showering, the sounds of drawers and closets opening and closing, and then someone exiting the apartment. They did not hear any sounds of a struggle.

15. I was informed and believed that on March 1, 1993, Santa Monica Police Detective Jim Archer interviewed Mary Avila, who resides at 1959 Cloverfield Blvd., Apt. 122. Detective Archer told me Mary Avila reported that she was close friends with the victim, and that she saw him on Friday, February 26, 1993 at approximately 6:30 p.m. in the company of several white males, one of whom had sandy brown hair.

Ms. Avila reported that on Saturday, February 27, 1993, she spoke with the victim, who told her that people with him the day before were friends from Louisiana.

16. While still at the crime scene in the afternoon of March 1, 1993, the Flagstaff, Arizona Police notified the SMPD that they had arrested James McNally, who was driving the Audi Fox owned by the victim, James Jones. The Flagstaff Police said that suspect McNally admitted to being in Jones' apartment, and wanted to talk to detectives. McNally told the Flagstaff Police where the murder weapon was located, and based on his information, we recovered a bloody kitchen knife from the roof of the carport at the victim's residence.

17. On March 2, 1993, I flew to Flagstaff, Arizona, along with Detective Sergeant Ray Cooper, to question James McNally regarding the death of James Jones and to return him to California. I read Mr. McNally his *Miranda* rights; he waived them, and agreed to speak with us. He said he had met Mr. Jones at a bar and gone home with him. He said that Jones came out of the bathroom naked, holding a knife and demanding sex. He said they struggled, he got hold of the knife and he killed Mr. Jones in self defense. My assessment was that

Mr. McNally was not being truthful with us, because his story did not fit with the physical evidence at the crime scene.

18. With the arrest of McNally I suspected we were dealing with a homosexual incident because of the dead male body, the X-rated bisexual video, the presence of semen, the presence of body hairs in the bed that did not match those of the victim, and the degree of violence or overkill in the homicide, indicating passion or rage.

19. I also knew that I was dealing with a robbery or a burglary, because the apartment was ransacked, the living room stereo and VCR were disconnected, and some of the victim's property, including his automobile and other items, was missing. If McNally formed the intent to steal from the victim before the homicide, the crime would be a special circumstances case, and he could be sentenced to life in prison without possibility of parole. If McNally formed the intent to steal after the homicide, the crime could be a lesser offense, possibly second degree murder or manslaughter.

20. Based on my experience and training in crime scene investigation, the

evidence collected, and the neighbors' statements, my opinion was that the circumstances of Jones' death were not consistent with self-defense. First, I concluded, based on the position of the body and the pattern and distribution of blood in the bed and throughout the apartment, that the victim had been surprised. Second, the victim was a very large male, as is Mr. McNally. The scenario that McNally described to us involved a struggle. The downstairs neighbors, present in the room directly below, in the dead of night, did not hear a struggle. They did hear sexual activity prior to a muffled cry. Third, McNally sustained only a relatively small injury to one hand. If Jones started out with the knife, intending to do McNally harm, it is probable that McNally would have been more seriously injured. All of this evidence points to a victim who was surprised, and a killing that was not self-defense. The story of self-defense that Mr. McNally described was not consistent with the physical evidence.

21. I have been a police officer for 23 years, and a detective for 18 years. Since becoming a detective I have regularly attended numerous advanced professional educational training schools, seminars and courses on homicide investigation and

interrogation techniques. I have attended a multi day course on California Homicide Investigation nearly every year since 1986, as well as many other specialized courses. The curriculums have covered a variety of topics, including interrogation techniques and the laws regarding *Miranda* rights and constitutionally permissible interrogation. In addition, I regularly talk to other homicide detectives, and to District Attorneys and various judges regarding permissible interrogation of criminal suspects. All of these sources regularly give me feedback about what interrogation techniques will elicit an admissible statement, and what techniques might cause the court to exclude a statement for any purpose.

22. My role as a police detective is to solve crimes. This includes collecting evidence in order to identify what crime, if any, has been committed, and to identify the perpetrator(s). My questions are designed to elicit information to confirm that the person I am questioning is, indeed, involved in the crime. To identify what crime has been committed, I must understand what happened at the crime scene. In a homicide, the state of mind and intent of the perpetrator affect the degree of the crime. My questions are designed to

elicit facts that will establish whether a homicide is first degree murder, second degree murder or manslaughter, and whether a first degree murder is a special circumstance case. The prosecutor then uses this evidence to decide how to charge the crime, and to develop and try the case.

23. My questions are also designed to elicit information about whether there is a weapon or other material that could pose a danger to the public or the police, whether there are accomplices or witnesses to the crime, and if so, their whereabouts, and about the location of other victims or missing property. I also may inquire into whether the perpetrator of one crime might be responsible for other unsolved crimes, or whether he or she is a serial perpetrator of a crime such as rape or burglary.

24. My questions are designed to test whether the version of events recounted by the crime victim and witnesses is accurate and is verified by the suspect. Often, the suspect may be the only other person with first hand knowledge to confirm the version of events recounted by the victim. If there is no victim who can speak, my questions are designed to reconcile the evidence of the crime scene.

25. I always Mirandize every custodial suspect before I interview him or her. Rarely will a custodial suspect invoke his or her *Miranda* rights and refuse to speak to me. It is my experience that most people want to tell their story, and want to talk to me.

26. During the course of my detective career I have interrogated approximately 50 murder suspects, in 40 different crimes. Of those, I have questioned the suspect outside of *Miranda* in only three or four instances. I have questioned outside of *Miranda* only rarely in my career, in less than 5% (five percent) of the total interrogations.

27. I have never had an out of *Miranda* confession that I took used for impeachment. Either the out of *Miranda* statement was exculpatory, and useful to the defense, the defendant did not testify. Mr. McNally's trial was the first and only case in which an out of *Miranda* confession that I took was excluded by the court for all purposes.

28. When I am investigating a homicide and I question outside of *Miranda* my intent is to find out what happened, regardless of whether the information is

admissible to prove guilt at trial. I am looking for information that is consistent with the physical evidence at the scene. I am also looking for exculpatory information that may reveal that I have the wrong suspect, or that the crime is chargeable as second degree murder or manslaughter, rather than first degree or special circumstances. I also may be trying to uncover accomplices and witnesses to the crime. I may be looking for a body, for weapons, or for missing property.

29. It is my understanding that I would not be civilly liable for questioning a suspect outside of *Miranda* so long as my questioning is not physically or psychologically abusive, and does not shock the conscience. I have been trained that *Miranda v. Arizona* and cases that follow set out rules of evidence, that apply to testimonial statements taken from suspects in custody. I know from my training and experience that evidentiary statements taken outside of *Miranda* may be excluded from the case in chief at trial. I have learned that physical evidence that I find, or leads to witnesses or accomplices that I develop based on benign questioning outside of *Miranda* may be used at trial.

30. At the time of an interrogation, I do not know whether a suspect will be charged with a crime. My job is to get the suspect's truthful statement, if he or she will talk to me, and to collect evidence that is used to solve and prove the crime. Although I work closely with prosecutors, my role is separate and distinct from theirs. The prosecution will decide whether ro charge a suspect, and with what crime, based on information that I uncover and other information from any available source.

31. I do not have the power or duty to determine which, if any statements are admissible in a court of law. That is up to the trial judge.

32. About two thirds of the way through the interrogation Mr. McNally asked to speak to a "California" attorney. We were, at that time, in Arizona. McNally could not speak to a California attorney until we returned to California, later that day after his extradition hearing.

33. When I questioned Mr. McNally in Flagstaff, Arizona, I was mindful that at least one witness, Mary Avila, had seen the victim, Mr. Jones, in the company of one or more Caucasian males, at least one of whom had sandy brown hair, several days

before the crime. Mr. McNally has sandy brown hair. Mr. McNally told me that he had taken the bus to California from Arizona, had met up with two other men and gone to Venice Beach. I wanted to determine if Mr. McNally and the acquaintances he described were the same people seen by Mary Avila with the victim, Mr. Jones, several days earlier. If so, these individuals might have been accomplices to the crime, or witnesses to the crime. If I could identify these individuals by questioning Mr. McNally outside of *Miranda*, my understanding is that evidence developed from this questioning would have been admissible at trial.

34. We interrogated McNally in Flagstaff, Arizona starting at noon, in the Coconino County Jail. The interrogation took place in a large day room, approximately 20 feet by 30 feet, with a long table in the center. Mr. McNally, Sergeant Cooper and I were the only people present. McNally did not eat or drink during the interrogation, nor did he request any food or drink. The temperature in the room was comfortable. The room was well lit. There were no exterior windows. Two doors had wire safety windows that overlooked a corridor. I do not recall McNally being handcuffed or restrained in any way. I did

not yell or scream at him at any time. I did not hit him, rough him up or otherwise physically intimidate or threaten him. Neither did Sergeant Cooper. The entire conversation was conducted in a businesslike volume and tone. Both Sergeant Cooper and I were dressed in business suits. McNally didn't cry or otherwise break down emotionally.

35. The entire interrogation lasted less than one hour and fifteen minutes. My recollection is that the interrogation continued for approximately 10 - 15 minutes after the tape stopped recording. I was unfamiliar with the tape recorder, and did not discover until later that minutes were missing from the end of the tape.

36. During the unrecorded portion of the interview I questioned McNally for the purposes of identifying witnesses or accomplices to the crime. I questioned him about his acquaintances with whom he spent the day prior to meeting Jones, and tried to ascertain if he was the same person seen with the victim by Mary Avila on Friday, February 26, 1993. I also questioned McNally in an attempt to recover the property stolen from the victim's house.

37. I questioned Mr. McNally out of *Miranda* in order to reconcile the evidence that this was a homosexually related "crime of passion" or rage, with the evidence of robbery or burglary. In my experience the District Attorney assigned to a case always asks me what I think happened and how the crime should be charged. I was trying to ascertain whether this was a special circumstances case, or some lesser crime. I was not questioning Mr. McNally outside of *Miranda* for the sole or primary purpose of developing impeachment evidence against him.

38. At the time that I questioned McNally outside of *Miranda* I did not believe that I was violating any of his constitutional rights.

39. About two thirds through the interrogation McNally asked to speak with a California attorney. We were not in California at that time. I told him that from that point on nothing he said could be used against him. We continued to speak for several pages of transcript. On page 57 of the transcript I said

". . .The only thing is, everything that falls after this - we'll go in one direction based on the physical evidence and the

statements that we have. If we don't have anything to the contrary, that's the direction we're gonna' go and we're gonna' push it."

McNally said, "Right." and then I said,

"Okay, and fuck your attorney. It's just - I don't care about him anymore."

This interchange referred to the evidence to be presented to the District Attorney supporting the correct charge for the crime. Whether, based on the property thefts, I believed McNally intended to steal form Jones, and killed him to facilitate the theft - a special circumstances case. Or, whether, based on the evidence of rage or passion, McNally should be charged with a lesser degree of murder. I was communicating to Mr. McNally that the only statement I would find persuasive is one that is consistent with the physical evidence, regardless of the advice of an attorney. Conferring with an attorney, and the passage of time would not change the truth about what happened in this case. In fact, the more time that passed the less accurate McNally's recall would be. And if there were other suspects or accomplices, the passage of time would make them more difficult to apprehend. This is especially true since Mr. McNally's

acquaintances were, by his account, transients.

40. This interchange was also intended to communicate to McNally that the evidence collected so far, including his incredible story of self-defense, was consistent with a special circumstances charge; therefore, unless he could provide a credible statement, consistent with the physical evidence, of some lesser intent, he was facing a special circumstances charge of life without possibility of parole.

41. Mr. McNally used the word "fuck" or one of its variations numerous times throughout the interrogation. He used this word both before and after my usage. I did not think he was offended by the word, or that he took its casual usage as anything more than common street vernacular.

42. Even after Mr. McNally's invocation, he said several times that he wanted to talk, and wanted to tell us what happened.

43. McNally then gave us a statement outside of *Miranda*. He said he met the victim outside of the Oarhouse, a local bar. Jones asked him if he wanted to

have some beers, and he went home with Jones. They watched a pornographic video. Jones offered him $50 in exchange for sex, and said he could spend the night. He agreed to have oral sex with the victim, and they did. They were in Jones' bed together and nude. McNally then tried to go to sleep. Jones touched him in an attempt to have anal sex. McNally didn't like it. He went to the kitchen, ostensibly to get a beer, and also found a kitchen knife. He returned to the bedroom, concealing the knife, and put it on the floor near the bed. He got back into bed. He told Jones he wanted to go to sleep. His back was to Jones. When Jones again touched him in an attempt to have sexual contact McNally used the knife to stab him. He then rifled through the apartment looking for the $50 he had been promised, and fled, taking some compact discs, a video camera, and the victim's automobile.

44. The out of *Miranda* statement that McNally made was consistent with the crime scene evidence. And, it resulted in my telling the District Attorney that I did not believe McNally formed the intent to steal before killing Mr. Jones. McNally's statement before invocation was not consistent with the crime scene evidence.

45. Mr. McNally remained in my presence and my company for several hours after the interrogation, including the plane ride back to California. We conversed during that time. Much of the conversation was initiated by McNally himself. Most of the time, we talked about sports or other casual conversation.

46. Mr. McNally telephoned me in 1994 to discuss the pre-trial probation officer's report, dated May 19, 1993. A true and correct copy of this report is atached as Exhibit "I". A true and correct copy of the transcript of this telephone conversation is attached as Exhibit "K". McNally took issue with the probation report's statement, taken from police crime report, that he "made love" to the victim, because he claimed it was inaccurate. Notably, McNally did not express concern about the accuracy of the pre-trial report's statement that the death of Jones was cruel, callous, and intentional. During that telephone conversation McNally told me that I had been "real honest" and "above the board" with him, and that his only problem with the report was the statement that he made love to the victim.

47. Mr. McNally was tried for murder and robbery in December of 1994. He moved to have his confession of murder

excluded for all purposes. I attended the hearing on the motion. The court granted the motion and excluded the confession for all purposes. So, the case was tried on McNally's first version of the facts -- the self defense version -- and the jury convicted McNally of manslaughter.

48. I have reviewed the Declarations of Rutledge, Tyler, Hill and Carey attached hereto. The courses I attended on interrogation techniques and the laws regarding Miranda rights and constitutionally permissible interrogation were consistent with the teachings expressed in those declarations.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration is executed at Santa Monica, California, on May 5, 1997.

/s/Shane Talbot
DETECTIVE SHANE TALBOT